(9)

No. 92-1370-CFX
Status: GRANTED

Title: BFP, Petitioner
v.
Resolution Trust Corporation, as Receiver of
Imperial Federal Savings Association, et al.

Docketed:
February 16, 1993

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Woolsey,Roy B.

Counsel for respondent: Sment,Michael R., Kidd,Robert F.,
Bryson,William, Solicitor General

40 printed copies rec'd 021693-1 retained (typos) 40
corr'd rec'd 021693 NOTE: Due 021593 HOL

Entry	Date	Note	Proceedings and Orders
1	Feb 16 1993	G	Petition for writ of certiorari filed.
2	Mar 1 1993		Letter from petitioner in compliance with Rule 29.1 filed.
4	Mar 18 1993		Order extending time to file response to petition until April 26, 1993.
5	Mar 24 1993		This extention is granted for all respondents.
6	Apr 22 1993		Brief of Federal respondent filed.
7	Apr 26 1993		Brief of respondents Imperial Saving & Loan Association, et al. in opposition filed.
8	Apr 28 1993		DISTRIBUTED. May 14, 1993
9	May 6 1993	X	Reply brief of petitioner filed.
10	May 10 1993	X	Supplemental brief of petitioner filed.
12	May 17 1993		REDISTRIBUTED. May 21, 1993
13	May 24 1993		Petition GRANTED.
			**********
14	Jul 8 1993		Brief amici curiae of Frank Allen, et al. filed.
18	Jul 8 1993		Order extending time to file brief of petitioner on the merits until July 9, 1993.
15	Jul 9 1993		Joint appendix filed.
16	Jul 9 1993		Brief of petitioner BFP filed.
19	Jul 19 1993	G	Motion of respondents Paul Osborne, et al. for divided argument filed.
22	Aug 6 1993		Brief amicus curiae of Jim Walter Homes Inc. filed.
20	Aug 9 1993		Record filed.
		*	Original proceedings U. S. Bankruptcy Appellate Panel.
21	Aug 12 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
23	Aug 19 1993		Brief amici curiae of Federal Home Loan Mortgage Corporation, et al. filed.
24	Aug 19 1993		Brief amici curiae of American Council of Life Insurance, et al. filed.
25	Aug 20 1993		Brief of respondents Paul Osborne, et al. filed.
28	Aug 20 1993		Brief amici curiae of California Trustee's Association, et al. filed.
26	Aug 23 1993		Brief amici curiae of Council of State Governments, et al. filed.

No. 92-1370-CFX

Entry	Date	Note	Proceedings and Orders
27	Aug 23 1993		Brief of the Federal respondent filed.
29	Aug 23 1993		LODGING consisting of 9 copies of one document received from the Solicitor General.
30	Aug 25 1993		Record filed.
		*	Original proceedings United States District Court for the Central District of California. (BOX)
31	Sep 24 1993		Motion of respondents Paul Osborne, et al. for divided argument GRANTED.
32	Sep 27 1993		Reply brief of petitioner filed.
33	Oct 12 1993		CIRCULATED.
34	Oct 14 1993		SET FOR ARGUMENT TUESDAY, DECEMBER 7, 1993.(2ND CASE).
35	Dec 7 1993		ARGUED.

(1)

92-1370

Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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119 pp

QUESTIONS PRESENTED FOR REVIEW

(Rule 14.1(a)

The questions presented for review are:

Does the price received at a non-collusive regularly conducted foreclosure sale establish irrebuttably the reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A)?

Does mere compliance with state laws on foreclosure prevent avoidance in bankruptcy of a non-collusive foreclosure sale as a sale for less than reasonably equivalent value under 11 U.S.C. Section 548(a)(2)?

Does the requirement in 11 U.S.C. Section 548(a)(2) of reasonably equivalent value create a federal standard concerning the power of trustees and debtors in possession in bankruptcy to avoid pre-bankruptcy foreclosure sales?

LIST OF THE PARTIES

(Rule 14.1(b))

The names of all of the parties in the proceeding appear in the caption of this case and on the cover and first page of this petition.

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References to reports of opinions in this case by other courts are:

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In re BFP, 132 B.R. 748 (Bankr. 9th Cir. 1991); Appendix herein, p. 49.

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendants

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, BFP, a Partnership, respectfully petitions for a Writ of Certiorari to review the decision of the Circuit Court of Appeals for the Ninth

Circuit in two consolidated appeals, [1] both concerning orders in the same bankruptcy proceeding as follows:

I

STATEMENT OF GROUNDS OF JURISDICTION OF THE UNITED STATES SUPREME COURT

The jurisdiction of this Honorable Court is invoked on the grounds that:

The decision of the United States Courts of Appeal for the Ninth Circuit sought to be reviewed is in conflict with the decisions of the United States Courts

---

1. Both appeals are entitled In re BFP, a partnership, Debtor; one is also entitled BFP, a Partnership v. IMPERIAL [etc.], Defendant, and PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ, Defendants-Appellees, CCA No. 91-55632, District Court No. CV--90-0436-LTL; the other is also entitled BFP, a Partnership v. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, Appellee, CCA No. 91-56480, BAP No. CC-90-1712 JVP; both appeals are from orders of the United States Bankruptcy Court for the Central District of California in Adversary Case No. SA-89-0977JR.

of Appeal in five other circuits. It holds that the bid at a noncollusive foreclosure sale is irrebuttably presumed to be the reasonably equivalent value.

Also, the decision decides an important question of federal law which has not been, but should be, settled by this court. That question is: Can a trustee in a bankruptcy avoid a noncollusive foreclosure sale conducted in accordance with state law?

The decision interprets 11 U.S.C. Section 548 contrary to its plain, unambiguous language, contrary to the decisions of this Court on statutory interpretation.

The judgment sought to be reviewed was entered in the Court of Appeals for the Ninth Circuit on September 8, 1992. A petition for rehearing was filed timely on September 22, 1992 and denied on November 17, 1992.

The 90th day from the denial of the petition for rehearing is February 15, 1993, a court holiday, and the last day for filing this petition will be February 16, 1993.

The Supreme Court of the United States has jurisdiction as provided in 28 U.S.C. Section 1254(1) and the petition is timely as provided in Rule 13.1 and 13.4.

II

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ETC. INVOLVED

The only constitutional provisions, treaties, statutes, ordinances and regulations involved are the following and they are quoted in the Appendix hereto (App. pp. 69 to 74):

Article 1, Section 8, clause 4 of the United States Constitution gives the Congress power to enact bankruptcy laws.

11 U.S.C. Section 101(54), the second of two 54s referred to as [58](54), formerly (40), defines transfer.

11 U.S.C. Section 548(a)(2)(A), provides that the trustee in bankruptcy may avoid pre-bankruptcy transfers for less than reasonably equivalent value.

11 U.S.C. Section 1107, gives a Debtor in Possession the powers of trustee under the Bankruptcy Code.

III

STATEMENT OF THE CASE

A. FACTS

On November 24, 1989, petitioner, BFP, filed its Petition for Relief Under Chapter 11 of the U. S. Bankruptcy Code.

Within a year prior thereto, on July 12, 1989, real property of the petitioner was sold at a foreclosure sale. The

foreclosure sale was on a trust deed held by Imperial Savings & Loan Association which secured a note in the original amount of $356,250.00. That trust deed was senior to a $200,000.00 trust deed held by Sheldon and Ann Foreman.

At the sale, respondent OSBORNE and the other individual respondents, purchased the property for $433,000.00 when its value was over $700,000.00.[2]

Prior to the sale, BFP, the Debtor, Sheldon Foreman, a junior lien holder, and other persons, were litigating title to the property. The sale was originally set for December of 1988 and continued from time to time. Sheldon Foreman and BFP requested respondent Imperial Savings & Loan, the beneficiary under the trust

---

2. Not in the record: public record, a deed dated December 21, 1989, recorded January 31, 1990 as Instrument No. 057406, Office of the Recorder, Orange County, California shows respondents resold for over $659,500.00.

deed on which the foreclosure occurred, to defer the sale until after the state court determined title in the pending title action. Mr. Foreman had requested notice of the continued sale date.

The only notice of the time and place of sale given was the statutory notice that a sale was to take place in 1988 and the oral pronouncements of continuances at the time and place set for the sale and continued sales. The foreclosure sale occurred on July 12, 1989.

Petitioner filed an adversary complaint to avoid the sale. The bankruptcy court granted the motion of the individual respondents for dismissal for failure to state a claim upon which relief can be granted and later granted the motion of respondent, Imperial Savings & Loan Association, for summary judgment and judgment on the pleadings. Intervening

courts and the Court of Appeal affirmed.

B. JURISDICTION OF THE COURT OF FIRST INSTANCE AND INTERVENING COURTS.

The Bankruptcy Court had jurisdiction under 28 U.S.C. Section 157(a) and (b)(2)(H), 28 U.S.C. Section 1334(b) and 11 U.S.C. Section 548(a)(2).

Jurisdiction of intervening courts is stated in the Appendix (App. p. 82)

IV

ARGUMENT

A. RELEVANT STATUTORY AVOIDANCE POWERS.

The pertinent provisions of the statutes under consideration with the 1984 additions thereto underscored are: 11 U.S.C. Section 101(54) referred to as [58] or the second (54) which provides:

> ". . . 'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and <u>foreclosure of the debtor's equity of redemption</u>" (emphasis added to show 1984 amendment); and

11 U.S.C. Sec. 548 which provides:

> "(a) The trustee may avoid any transfer of an interest of the debtor in the property, . . . that was made . . . within one year before the date of the filing of the petition, if the debtor <u>voluntarily or involuntarily</u> -- . . .
>
> (2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and . . ." (emphasis added to show 1984 amendment).

Petitioner BFP had those powers (11 U.S.C. Section 1107).

B. THE DECISION SOUGHT TO BE REVIEWED IS IN CONFlCT WITH THE DECISIONS OF COURTS OF APPEAL OF FIVE OTHER CIRCUITS

The decision sought to be reviewed holds that there is an irrebuttable presumption that the high bid at a noncollusive, regularly conducted foreclosure sale is irrebuttably presumed to be the reasonably equivalent value. That holding conflicts with the decisions of Courts of Appeal in the Third, Fifth, Seventh, Eighth and Eleventh Circuits. Petitions for Certiorari were filed to review two of those decisions and certiorari was denied by this Honorable Court.

In First Fed Sav. & Loan Ass'n Bismark v. Hulm. (In re Hulm), 738 F.2d 323, 327 (8th Cir. 1984) cert. denied, 469 U.S. 990 105 S.Ct. 398, 83 L.Ed 2d 331 (1984), the court wisely observed:

"the Bankruptcy Code provisions are

clear . . . and direct the result we have reached. Hence, policy considerations cannot affect the outcome of the case but must be addressed, if at all, by Congress."

In the Matter of Grissom, 955 F.2d 1440 (11th Cir. 1992), in reversing a judgment avoiding the sale, the Eleventh Circuit Court adopted a rule in conflict with the decision sought to be reviewed and remanded for further consideration by the trial court (in accordance with the rule said circuit court adopted). The court said that we must endeavor to prevent foreclosure sales which unnecessarily deplete the resources of a bankruptcy estate (p. 1442), and:

"one factor in rebutting the presumption of reasonableness is . . . the foreclosure sale achieved less than 70% of the property's market value . . .,

courts should consider whether or not the foreclosing party obtained a fair appraisal, . . . the extent to which advertised, and the competitive conditions surrounding the sale", (p. 1446)

Other Courts of Appeal decisions with which the decision sought to be reviewed conflicts are:

Durrett v. Washington National Insurance Co. (In re Durrett), 621 F.2d 201 (5th Cir. 1980); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir) cert. denied, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1981).

Bundles v. Baker. (In re Bundles), 856 F.2d 815 (7th Cir. 1988). There the court said:

"Accordingly, we must reject the view that state law, either directly or as the federal rule of decision, should determine the outcome

of a bankrupt's complaint under section 548(a)(2)(A). Here, Congress has set forth a federal standard. We must give effect to that congressional will, however ambiguous its manifestation." (p. 822)

See also Barrett v. Commonwealth Federal Savings Ass'n, 939 F.2d 20, 23-25 (3rd Cir. 1991) saying that there was no irrebuttable presumption but finding reasonably equivalent value in that case and reversing the order avoiding the sale.

In addition, Judge Volinn's dissent in BAP decision in this case cited several decisions of lower courts in other circuits which are contrary to the above entitled decision (App. p. 47).

The only Court of Appeal case we find which agrees with the decision we seek to have reviewed is In the Matter of Winshall's Settlor's Trust, 758 F.2d 1136

(6th Cir. 1985) involving a transfer which occurred in 1983, before the 1984 amendments to 11 U.S.C. Sections 101 and 548.

It is difficult to reconcile the decision sought to be reviewed with In re Ehring, 900 F.2d 184 (9th Cir. 1990). There the Court of Appeal ruled that a mortgage foreclosure sale was a transfer for the purposes of 11 U.S.C. 547 (d) on avoiding pre-petition preferences. There, at page 187, the court stated that in 1984 Congress amended the definition of "transfer" to include the "foreclosure of the debtor's equity of redemption," 11 U.S.C. Section 101[58](54) and "foreclosure is a transfer for purposes of fraudulent conveyances (11 U.S.C. 548)". Thus, in Ehring the 1984 amendments were applied; an amendment to Sec. 548 to provided an irrebuttable presumption that the price bid was reasonably equivalent

was proposed and not adopted as said in Bundles v. Baker, supra. The decision which we seek to have reviewed seeks to insert such a provision in the statute.

In the decision sought to be reviewed, it was not explained how, if a mortgage foreclosure is a transfer for purposes of the fraudulent conveyance statute, the bid price establishes the reasonably equivalent value required by 11 U.S.C. 548; such a rule bars the remedies of Section 548. In 1984, Sections 101 and 548 were amended to change the rule announced in In re Madrid Lawyers Title Ins. Corp., 725 F.2d 1197 (9th Cir 1984), cert. den., 469 F.2d 1197 (1984), the appeal from 21 B.R. 424 (9th Cir. BAP 1982). The former held that a foreclosure sale was not a transfer and the latter that a foreclosure sale established the reasonably equivalent value.

C. THE DECISION DECIDES A FEDERAL QUESTION, INTERPRETATION OF FEDERAL STATUTES, IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The Opinion sought to be reviewed reads:

> "The Bundles analysis (and implicitly that of the Durrett approach) rests on a plain-language interpretation of Section 548(a)(2). Granting an irrebuttable presumption of reasonable equivalence under a noncollusive foreclosure sale, the Bundles court argues, effectively creates a judicial exception to the trustee's avoiding powers under Section 548. Id. at 823. In turn, an irrebuttable presumption undermines the ability of the trustee or debtor to recover lost equity, which is the purpose

> of the Section 548 avoiding powers. The position is persuasive, but we think that broader considerations require a different result."

We think that portion of the Opinion is an erroneous statement of the function of the courts and conflicts with cases cited above and with decisions of this Honorable Court.

In Toibb v. Radloff, 501 U.S. ____, 115 L.Ed. 2d 145, 152, 111 S.Ct. 2197, 2200 (1991), in holding that a person without a business could file under Chapter 11 of the Bankruptcy Code, the court said:

> "First, this Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative

history if the statutory language is unclear." Blum v. Stenson, 4645 U.S. 886, 896, 79 L. Ed. 2d 891, 104 S.Ct. 1541 (1984). The language of Section 109 is not unclear. Thus, although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here."

In accord: United States v. James, 478 U.S. 597, 92 L.Ed.2d 483, 493, 106 S. Ct. 3116

D. IMPORTANT QUESTIONS OF FEDERAL LAW DECIDED HAVE NOT BEEN, AND SHOULD BE, SETTLED BY THIS COURT

There are hundreds of cases decided each year in which mortgage foreclosure sales are sought to be avoided under 11 U.S.C. Section 548(a)(2). Yet the ap-

plicability of said section to foreclosure sales has never been settled by this Honorable Court.

In this case the allegations and evidence showed that the sale had been continued and the holder of the second trust deed who had reinstated the trust deed said he would do so again, requested notice of the continued sale date and was not given notice of the continued date.

Even Madrid, 21 B.R. 424, 427 (1982) said:

" '[T]here must in addition [to inadequacy of price be proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price.'".

Mere unfairness is not a state law ground. The foregoing was said in the interpreting a federal statute. In In re Tome, 113 B.R. 626 (Bktpcy. C.D. Cal.

1990) the court wisely observed that after continuances of sale noticed as required by state law, the bankruptcy court could require notice in addition to notice required by state law.

The opinion erroneously recites that a court decision that the bid price is not the reasonably equivalent value would destabilize the mortgage markets. There was no evidence before the court as to whether or not a ruling in favor of appellant would destabilize the mortgage markets.

If the court is to take judicial notice of the effect on the mortgage market, it should take judicial notice that it is to the contrary. See Shuchman, Data on the Durrett Controversy, 9 Cardoza L.Rev. 605, 616 (1987); In re General Industries, Inc., 79 B.R. 124, 133 (Bktcy. D. Mass. 1987); and In re Lindsay, 98 B.R. 983 (Bktcy. S.D.Cal.

1989). The latter case has an excellent analysis and statement of what the law should be.

The opinion of the Ninth Circuit Court sought to be reviewed relies on a quotation from pages 963-4 of an article by Professor Ehrlich in 71 Va.L.R. 932, pp. 965-967. If it is to be considered by any Court, the Court should also consider our quotations from pages 965 to 967 of that article which appears in our Appendix (App. pp. 75-81).

V

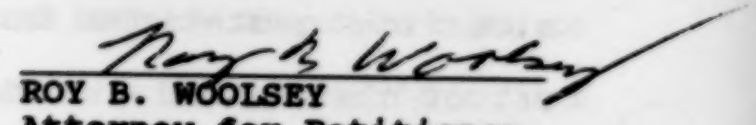
CONCLUSION

It is requested that this Honorable Court grant certiorari to review the decision of the Court of Appeals in the consolidated cases described in footnote 1, on page 2 hereof, conform this case to the decisions of the other circuits, require it to conform to rules of statu-

tory construction settled by this court, and require sales efforts such as advertising and notice of continued sale dates before there can be a presumption that a bid at a foreclosure sale is the reasonably equivalent value.

Dated: February 5/12, 1993

RESPECTFULLY SUBMITTED,



ROY B. WOOLSEY
Attorney for Petitioner

D113:BFPSC.P89

APPENDIX

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Bankruptcy Court Order Dismissing Debtor's Complaint to Declare Transfer of Real property Null and Void, etc. filed 3-6-90 and entered 3-8-90	App.p. 28
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1991)

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Copy of pages 965-967 of "AVOIDANCE OF FORECLOSURE SALES AS FRAUDULENT CONVEYANCES; ACCOMMODATING STATE AND FEDERAL OBJECTIVES" by SCOTT B. EHRLICH, 71 Va.L.R. 932 — App. p. 75

Statement Concerning the jurisdiction of Intervening Courts — App. p. 82

COPY OF OPINION TO BE REVIEWED
974 F.2d 1991, CCA 9th -- 1992 --

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: BFP, a Partnership, Debtor.	
BFP, a Partnership, Appellant/Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, Defendant. and PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ, Defendants-Appellees	No. 91-55632 DC No. CV-90-0436-LTL OPINION

Appeal from the
United States District Court
for the Central District of California
Lawrence T. Lydick,
District Judge, Presiding

In re:	)	
	)	
BFP, a Partnership,	)	
	)	
Debtor.	)	
	)	
BFP,	)	No. 91-56480
Appellant,	)	
	)	BAP No.
v.	)	CC-90-1712-JVP
	)	
IMPERIAL SAVINGS & LOAN ASSOCIATION,	)	
	)	
Appellee.	)	

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Jones, Volinn, and Perris,
Judges Presiding

Argued and Submitted
July 9, 1992 -- Pasadena, California

Filed September 8, 1992

Before: Joseph T. Sneed and Dorothy W. Nelson, Circuit Judges and John M. Roll *

OPINION

SNEED, Circuit Judge:

This is a consolidated appeal by BFP, a California partnership, from an

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* Honorable John M. Roll, United States District Judge for the District of Arizona sitting by designation

adversary proceeding in the bankruptcy court instituted to avoid a transfer of property under the avoiding powers of 11 U.S.C. Section 548(a)(2)(A). We affirm.

I.

FACTS AND PROCEEDINGS BELOW

In July of 1987, Wayne and Marlene Pedersen and Russell Barton entered into a written arrangement involving the purchase of a home in Newport Beach, California owned by Sheldon and Ann Foreman. The Pedersens were to buy the Foreman home for $356,250 plus some rare coins, whose value is not disclosed in the pleadings. The Pedersens planned to raise the $356,250 from a bank loan, itself to be secured by a first deed of trust on the property. It is reasonable to assume that the Foremans believed their home had a value in excess of $356,250. The precise extent to which

the Pedersens and Barton shared that view is less certain.

The Pedersens also agreed to give Barton a 180-day option to purchase the home, after the Pedersens themselves effected its purchase from the Foremans. Barton planned to remodel. In exchange for the option to buy, Barton agreed to pay the Pedersens 25% of any profits earned on the home's resale.

In August of 1987, after the property went into escrow, a shadow passed over the transaction. Local newspapers reported that Wayne Pedersen was under investigation for fraudulent sales of rare coins. This caused the Foremans some trepidation, and all the parties agreed orally to structure a somewhat different arrangement. Instead of the Pedersens being the buyers, a partnership, BFP, was formed. Its sole partners were Wayne and Marlene Pedersen

and Russell Barton. Similar to the prior agreement between the Pedersens and Barton, the partnership agreed to divide profits from the resale of the Foreman home 75% to Barton and 25% to the Pedersens. The following transactions then took place.

On August 27, 1987, the Foremans deeded the property to the Pedersens. On the same day, the Pedersens then deeded the property over to BFP, the partnership. The Pedersens borrowed $356,250 from appellee Imperial Federal Savings Association[1] and BFP "borrowed" $200,000.00, in the form of a six-month promissory note, from the Foremans. Ostensibly, the note served as replacement value for the rare coins. Both

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1. Since the commencement of this suit, the Resolution Trust Corporation has been appointed receiver of Imperial. For convenience, we will continue to refer to the savings association by its former name.

loans were secured by deeds of trust on the home, Imperial's being a first, the Foremans' a second.

The Foremans' earlier misgivings proved well founded. Despite their initial conveyance to BFP, the Pedersens conveyed the property a second time to a concern called Off Road Vehicles--Recreation and Family Campground, Inc. BFP and the Foremans sued in state court to quiet title to the property.

While the state court suit was pending, Imperial, whose loan was not being serviced, instituted foreclosure proceedings on the property. Off-Road then filed an involuntary bankruptcy petition on behalf of BFP in order to secure an automatic stay of the foreclosure. BFP moved to dismiss the involuntary petition, and Imperial moved to lift the automatic stay. The bankruptcy court granted both motions; it lifted the stay

on June 12, 1989, and dismissed the involuntary case on June 14, 1989.

With the stay lifted, Imperial continued its foreclosure of the property. On July 12, 1989, Imperial conducted a foreclosure sale and sold the property to appellee Paul Osborne for $433,000. Osborne had no notice of the title dispute, and bought the property in good faith. BFP alleges that the property was actually worth over $725,000 at the time of the sale to Osborne. As a result, BFP claims that its equity in the property was lost.

On July 21, 1989, the state court in the suit to quiet title announced its intended ruling. The court decided to rescind the 1987 conveyance from the Foremans to the Pedersens and to award both the Foremans and Barton damages against the Pedersens. The court entered final judgment on October 12, 1989.

On August 18, 1989, after the state court announced its quiet title decision, BFP filed a second state court action which sought to rescind Imperial's conveyance to Osborne. The Foremans joined this action because, while their initial conveyance had been rescinded by the quiet title action, their ownership interest in the property stood to be destroyed by Osborne's good faith purchase of the property at Imperial's foreclosure sale. The stated grounds of this second state court action were that Imperial did not comply with the foreclosure procedures set forth in California Civil Code Section 2924 et seq.

On October 25, 1989, BFP filed for Chapter 11 bankruptcy, which caused the second state court suit to be stayed. BFP then instituted the adversary proceeding that is the subject of this

appeal.

The bankruptcy court on March 6, 1990 dashed BFP's and, no doubt, the Foremans' hopes when it dismissed the adversary complaint against Osborne for failure to state a claim. The court noted that BFP did not make any allegation that Imperial's trustee sale was in violation of California law, nor did BFP assert that the sale was conducted fraudulently or collusively. The court also found that Osborne was a bona fide purchaser for value, without notice, and ruled that there was no legal authority to set aside the sale as to Osborne. The district court summarily affirmed this dismissal, and BFP appealed on May 9, 1991.

The adversary proceeding continued to the summary judgment stage against Imperial and on July 10, 1990, the bankruptcy judge granted summary judgment in

favor of Imperial. It based its decision on two grounds. First, it held that there was no transfer of an interest in property by virtue of the first state court judgment, which rescinded the deed from the Foremans to the Pedersens. Wrote the court: "[T]he Pedersons [sic] did not have an interest in property when they purported to transfer the title to the property to BFP. Therefor [sic], BFP never received good title." Alternatively, the bankruptcy court ruled that Imperial's sale to Osborne could not be avoided under 11 U.S.C. Section 548(a)(2)(A) because "a reasonably equivalent value was received in exchange for the transfer, [and] the nonjudicial foreclosure sale was non-collusive and regularly conducted."

In a published opinion, In re BFP, 132 B.R. 748 (Bankr. 9th Cir. 1991), the bankruptcy appellate panel affirmed. The

court applied its previous decision, In re Madrid, 21 B.R. 424 (Bankr. 9th Cir. 1982), aff'd on other grounds, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S. 833 (1984), which held that the sale price in a noncollusive, regularly conducted foreclosure sale is, as a matter of law, reasonably equivalent value for purposes of 11 U.S.C. 548(a)(2)(A). Judge Volinn, who had dissented in Madrid, once more dissented. See In re BFP, 132 B.R. at 751-52 (Volinn, Jr., dissenting). This time he argued that Madrid should be overruled in light of more recent decisions from courts of appeals in other circuits, which themselves followed the suggested course of his earlier Madrid dissent. BFP appeals the bankruptcy appellate panel decision. We must now decide whether the bankruptcy court, the district court, and the bankruptcy appellate panel were correct in

letting Imperial's foreclosure and Osborne's purchase of the Foreman home stand.

II.

JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. Section 158(d).

The bankruptcy appellate panel's decision in the Imperial case and the district court's summary affirmance in the Osborne case are reviewed de novo. Findings of fact in the bankruptcy court are reviewed for clear error. We may affirm on any ground finding support in the record. See In re Siriani, No. 91-15856, slip op. 6545, 6550 (9th Cir. June 12, 1992).

III.

FRAUDULENT TRANSFERS UNDER SECTION 548(a)(2)

[1] Section 548(a)(2) of the

Bankruptcy Code sets forth the avoiding powers of a bankruptcy trustee as they relate to fraudulent transfers of a debtor's interest in property. To avoid a transfer under this section, four elements must be satisfied:

(1) the debtor must have an interest in the property,

(2) the debtor must have been insolvent at the time of the transfer or become insolvent as a result of the transfer,

(3) the transfer must have occurred within one year of the bankruptcy filing; and

(4) the debtor must have received "less than a reasonably equivalent value" for the transfer.

See In re Bundles, 856 F.2d 815, 816-17 (7th Cir. 1988). Only the first and last elements are disputed on this appeal.

A. Did BFP have a property interest in the Foreman home?

[2] Whether a debtor has a property interest under 11 U.S.C. Section 548 is a question determined by state law. In re Torrez, 63 B.R. 751, 754 (Bankr. 9th Cir. 1986). As noted above, the bankruptcy court found that BFP did not obtain good title to the Foreman home by virtue of the state court ruling rescinding the deed from the Foremans to the Pedersens. Imperial contends that the bankruptcy court was correct, and offers a number of arguments in support of its position.[2]

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2. For instance, Imperial posits that BFP would be unable to obtain "bona fide purchaser" status from the Pedersen-to-BFP grant because the Pedersems were general partners of BFP. BFP, asserts Imperial, is therefore imputed with knowledge of the Pedersen's fraudulent intent by virtue of the California partnership law, see Cal. Corp. Code Section 15012, and the Pedersen-to-BFP deed is consequently avoidable to the same extent as the Foreman-to Pedersen deed, see Perry v. O'Donnell, 749 F.2d 1346, 1349 (9th Cir. 1984).

[3] Legal arguments aside, however, the judgment of the state court clearly quieted title in favor of both the Foremans and BFP as against all other parties in the state court action. After first rescinding the original deed from the Foremans to the Pedersens, the state court then ruled as follows: "It is further ordered, adjudged and decreed that plaintiffs, B.F.P., Sheldon L. Foreman and Ann Fant Foreman are the sole owners of said real property in fee simple, and Sheldon L. Foreman and Ann Fant Foreman are the owners of the note secured by deed of trust ... dated September 16, 1987" (emphasis supplied). The September 16, 1987 deed of trust secures BFP's $200,000 note given to the Foremans. Thus, the state court judgment settled title in favor of the Foremans and BFP as co-owners in fee simple, and, in addition, validated the Foreman's

second deed of trust against BFP's fee interest securing the $200,000 debt owed by the partnership to the Foremans.

[4] Admittedly, the state court's reasoning is difficult to follow.[3] But the judgment is valid, and we must give

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3. The state court seems to hold that the Foreman-to-Pedersen deed became avoidable by a failure of consideration caused by the Pedersens. However, the Foremans received over $365,000 of loan proceeds upon their transfer of title to the Pedersens. There is additional language in the judgment that implies that the failre of consideration took place as a result of the Pedersen's subsequent breach of both the BFP partnership agreement and contractual duties owed to the Foremans. How this breach would cause a failure of consideration, as that concept is normally understood, or how the breach would affect the original grant, is not explained.

Imperial describes the state court judgment as one which found fraud perpetrated by the Pedersens which in turn induced the Foremans to deed over their property. This is certainly a plausible reading of the facts, but it is just not supported by the state court judgment or its official "Explanation of Decision." Indeed, the state court flatly ruled that "there was no such conspiracy to defraud" on the part of the Pedersens.

it full faith and credit. It follows that BFP did indeed have a property interest in the Foreman home at the time of Imperial's foreclosure sale to Osborne.

B. Did BFP receive "reasonably equivalent value" under 11 U.S.C. Section 548(a)(2)(A)?

[5] The bankruptcy appellate panel below applied its earlier decision in Madrid and held that the price received at a non-collusive, regularly conducted foreclosure sale establishes as a matter of law reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A). Although the issue is a close one, we agree that the Madrid rule is the appropriate interpretation of the Bankruptcy Code. As the Sixth Circuit has stated, "[T]he better view is that reasonable equivalence for the purposes of a foreclosure sale under Section 548(a)(2)(A) should be

consonant with the state law of fraudulent conveyances." In re Winshall Settlor's Trust, 758 F.2d 1136, 1139 (6th Cir. 1985) (citing Madrid). We necessarily part from the positions taken by the Fifth Circuit in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980[4] and the Seventh Circuit in

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4. The "Durrett rule" holds that so long as the debtor received at least 70% of fair market value, the sale cannot be avoided under Section 548(a)(2)(A). As has been pointed out elsewhere, the actual holding of Durrett does not explicitly establish a 70% floor. Rather, the court merely noted that it was unable to find a case that had approved a transfer "for less than 70 percent of the market value of the property." 621 F.2d at 203. For analytical purposes, it is nonetheless useful to treat Durrett as standing for the notion that some level of price inadequacy will result in a fraudulent transfer under Section 548(a)(2)(A). This is the interpretation given Durrett by numerous bankruptcy courts, and, historical accuracy aside, is in fact the Durrett rule." See Alan S. Gover & Glenn D. West, The Texas Nonjudicial Foreclosure Process--A Proposal to Reconcile the Procedures

Bundles.[5]

The Bundles analysis (and implicitly that of the Durrett approach) rests on a

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...Continued...

Mandated by State Law with the Fraudulent Conveyance Principles of the Bankruptcy Code, 43 Sw.L.J. 1061, 1062 (1990).

5. The Bundles court rejected both Durrett and Madrid, opting instead for what it called a middle ground approach. Under the Bundles formulation, "[r]easonable equivalence should depend on all the facts of each case." 856 F.2d at 824. The court felt that the "starting point" of the inquiry should be the fair market value, but listed also as relevant the market value as affected by the "fact of foreclosure." In the "usual circumstances," the court opined, a rebuttable presumption of reasonable equivalence would be appropriate. Nonetheless, state-specific foreclosure procedures might alter the analysis if they were not designed to "return to the debtor-mortgagor his equity in the property." Id. Thus it is proper to examine state foreclosure procedures and inquire whether "there was a fair appraisal of the property, whether the property was advertised widely, and whether competitive bidding was encouraged." Id. Still, it is necessary "to accord respect to the state foreclosure sale proceedings." Id. at 825.

plain-language interpretation of Section 548(a)(2). Granting an irrebuttable presumption of reasonable equivalence under a noncollusive foreclosure sale, the Bundles court argues, effectively creates a judicial exception to the trustee's avoiding powers under Section 548. Id. at 823. In turn, an irrebuttable presumption undermines the ability of the trustee or debtor to recover lost equity, which is the purpose of the Section 548 avoiding powers. The position is persuasive, but we think that broader considerations require a different result.

As has been widely recognized, allowing a bankruptcy court to undo a foreclosure sale carries with it the strong potential to destabilize state mortgage transactions. Professor Ehrlich summarizes the result succinctly:

"[T]he prospect that trial courts

will determine reasonable equivalence on a case-by-case basis is untenable from both federal and state perspectives. From a state viewpoint, an ad hoc approach produces intolerable uncertainty regarding the finality of any purchase at a foreclosure sale even if the price paid at the sale is close to, but not equal to, the retail market value. From a federal perspective, this uncertainty undermines the price-maximizing objectives of section 548(a)(2) because potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty."

Scott B. Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, Va.L.Rev. 933, 963-64 (1985).

Professor Ehrlich's observations are persuasive. It makes little sense to interpret Section 548(a)(2)(A) in a way that will likely discourage healthy foreclosure bidding.

[6] Perhaps more importantly by following the Madrid formulation we are able to give a reasonable meaning to Section 548 without unduly upsetting local real estate markets or state law. Unlike the Bundles court, we see the issue as both one of statutory interpretation and the growing tension between preemption and the requirements of a vigorous federal system. The Supreme Court has recently reminded us that our interpretation of federal statutes should be tempered with due regard for traditional state areas of regulation. See Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2617-18 (1992). Thus, by interpreting Section 548 in accordance

with the Madrid formulation, we are able to balance bankruptcy policy and comity concerns.[6]

We therefore hold that the price received at a noncollusive, regularly conducted foreclosure sale establishes irrebuttably reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A).[7]

AFFIRMED.

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6. We should note also that the Madrid formulation has been adopted by the National Conference of Commissioners on Uniform State Laws, see Unif. Fraudulent Transfer Act Section 3(b) (1984), and has been recommended by the American Bar Association, see 1983 A.B.A. Sec. of Real Prop. Rep. 106B.

7. We also agree with the lower courts that the applicable state procedures were complied with in this case and that BFP received adequate notice of the forclosure under California law.

JUDGMENT OF CCA 9TH FILED SEPTEBMER 8, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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c No. 91-55632

CT/AG#: CV-90-0436-LTL

In re: BFP, a partnership

Debtor

BFP, a Partnership

Plaintiff - Appellant

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION

Defendant

and

PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ

Defendants - Appellees

No. 91-56480
CT/AG#: CV-90-1712-JVP

In re BFP

Debtor

BFP

Appellant

v.

IMPERIAL SAVINGS & LOAN ASSOCIATION

Appellee

APPEAL FROM the United States District Court for the Central District (Santa Ana).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District (Santa Ana) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered September 08, 1992.

ORDER OF CCA 9TH DENYING PETITION FOR REHEARING, NOVEBMER 17, 1992

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: BFP, a Partnership, Debtor.	)	
BFP, a Partnership, Appellant/Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, Defendant. and PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ, Defendants-Appellees	) No. 91-55632) DC No. CV-90-0436-LTL) ORDER	
In re: BFP, a Partnership, Debtor.	)	
BFP, Appellant,	) No. 91-56480	
v. IMPERIAL SAVINGS & LOAN ASSOCIATION, Appellee.	) BAP No. CC-90-1712-JVP	

Before: Joseph T. Sneed and Dorothy W. Nelson, Circuit Judges and John M. Roll *

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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* Honorable John M. Roll, United States District Judge for the District of Arizona sitting by designation

COPY OF BANKRUPTCY COURT ORDER

FILED
MAR 6, 1990

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Attorneys for Defendants
PAUL OSBORNE, et al.

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	) Bk. No. SA89-) 06771-JR
BFP, a Partnership,	)
Debtor.	) CHAPTER 11
	) Adv. No. SA89-
BFP, a Partnership,	) 0977-JR
Plaintiff,	) ORDER DISMIS-) SING DEBTOR'S
vs.	) COMPLAINT TO) DECLARE TRANS-
IMPERIAL SAVINGS & LOAN ASSOCIATION; a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY; and DOES 1 to 10,	) FER OF REAL) PROPERTY NULL) AND VOID)) Hearing --)) Date: 2-6-90) Time: 10:00 am
Defendants.	) Place CTRM 520

The Motion to Dismiss Complaint for

Failure to State a Claim Upon Which Relief Can be Granted brought by defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ, AND RICHARD MARCZ (erroneously sued herein as Richard March) came on for hearing on February 6, 1990 at 10:00 a.m. in the above-entitled United States Bankruptcy Court before the Honorable John Ryan, United States Bankruptcy Judge, presiding. Movants appeared through their counsel, Michael R. Sment of Rich & Ezer. Debtor BFP, a Partnership, appeared through its counsel. Roy B. Woolsey of Woolsey, Angelo & Thatcher. No other appearances were made, nor pleadings filed, in connection with the Motion to Dismiss.

The Court, having considered the Motion to Dismiss and the declaration and exhibits attached thereto, the pleadings and records on file in connection with

this adversary action, the pleadings and records on file in connection with the above-entitled Bankruptcy case, the pleadings and records on file in connection with Movants' Motion for Relief from Automatic Stay herein (Ref. No. M9-0419-JR), the opposition filed by Debtor, and the arguments of counsel, and with good cause appearing therefor, makes it Order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Debtor's Complaint To Declare Transfer Of Real Property Null And Void, And To Vacate And Set Aside Trustees' Deed of Trust, And For Damages fails to state a claim upon which relief can be granted against Movants, and each of them. Debtor has failed to make any allegations that the involved trustee's sale was not in compliance with California state law, nor any allegations that said trustee's sale was conducted collu-

sively or fraudulently. Debtor also admits that Movants, as the purchasers at the trustee's sale, were bona fide purchasers who had no other involvement with the foreclosure proceedings or trustee's sale. Debtor has failed to present any authority whatsoever to authorize setting aside the trustee's sale as to Movants, as good faith purchasers. The authorities cited by Debtor in its opposition are not controlling or binding upon this Court. In Re Madrid (9th Cir. BAP 1982) and In Re Ehrling (9th Cir. BAP 1988) constitute the controlling decisions within the Ninth Circuit as to setting aside foreclosure sales pursuant to 11 U.S.C. Section 548. Debtor's Complaint To Declare Transfer Of Real Property Null And Void, etc. is hereby dismissed with prejudice as to Movants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ and RICHARD MARCZ.

DATED: MAR 6, 1990

(SIGNED) JOHN E. RYAN
UNITED STATES BANKRUPTCY JUDGE

COPY OF BANKRUPTCY COURT FINDINGS OF FACT

FILED
JULY 10, 1990
CLERK, U. S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

LAW OFFICES OF EDWARD G. SCHLOSS
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IMPERIAL SAVINGS & LOAN ASSOCIATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	) Bk. No.
	) SA 89-06771 JR
BFP, a Partnership,	)
	) Adv. No.
Debtor.	) SA 89-0977 JR
_____	)
	) Chapter 11
BFP, a Partnership,	)
	) FINDINGS OF
Plaintiff,	) FACT AND CON-
	) CLUSIONS OF
vs.	) LAW RE MOTION
	) FOR JUDGMENT
IMPERIAL SAVINGS & LOAN	) ON PLEADINGS
ASSOCIATION, a California	) AND/OR
corporation; PAUL OSBORNE	) SUMMARY
WILLIAM LITTLE; DENNIS	) JUDGMENT
ROY; ARTHUR RITZ; JOSE	)
CRUZ; RICHARD MARCZ; and	) Continued
Does 1 to 10,	) Hearing -
	)

Defendants.) Date: 6-18-90
) Time: 3:30 pm
) Place:U.S.
) Bankruptcy Ct
)

Movant's Motion for Summary Judgment came on regularly for Hearing on June 18, 1990, at 3:30 P.m., before the Honorable John Ryan. Movant/Defendant IMPERIAL SAVINGS & LOAN ASSOCIATION ("IMPERIAL" herein) appeared by and through its counsel of record, Mary C. Caroom, Esq. of the Law Offices of Edward G. Schloss. Debtor BFP, a Partnership ("BFP" herein) appeared through its counsel, Roy Woolsey, Esq.

Based upon the pleadings on file in this matter, the Statement of Uncontroverted Facts and Conclusions of Law and other good cause appearing, the Court makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Wayne L. Pederson and Marlene

Pederson ("Pedersons" herein) executed a deed of trust in the first position encumbering real property that is the subject of the property of this litigation. Said trust deed secured a promissory note for $356,200.00.

2. Said trust deed was recorded on August 25, 1987 as Instrument No. 87-481935.

3. IMPERIAL was the successor in interest to Loan Marketing and Brokers Services, Inc., the original beneficiary under the trust deed, by assignment recorded August 25, 1987.

4. BFP purports to hold title by virtue of a grant deed form the Pedersons to BFP, dated August 25, 1987 and recorded in or around September, 1987.

5. The Pedersons purported to hold title to the subject property by virtue of a grant deed from the Foremans to the Pedersons recorded August 25, 1987.

6. BFP is a partnership composed of Russell Barton and the Pedersons.

7. Prior to July, 1989 BFP and others filed a Superior Court Action as to the subject property in the Superior Court for the County of Orange, case No. X-54-16-04.

8. After a trial on the merits an Announcement of Tentative Decision was filed which states that the Deed form the Foremans to the Pedersons recorded August 25, 1987, was rescinded as between the parties and title was quieted in favor of the Foremans.

9. On October 12, 1989, a Statement of Decision was filed in the aforementioned action which states that the transfer of title to the Subject property from the Foremans to the Pedersons was rescinded as between the parties and title was quieted in favor of the Foremans.

10. On October 12, 1989, a Judgment was filed in the aforementioned action which states that deed from the Foremans to the Pedersons was rescinded as between the parties and that the Pedersons have no right, title estate or interest in said real property.

11. When the trust deed loan went into default, IMPERIAL elected to initiate foreclosure proceedings. A Notice of Default was recorded on July 29, 1988.

12. A Trustee's Sale was originally scheduled for December 29, 1988. Notice of the Sale was published for three consecutive weeks as required by the laws of the State of California.

13. Said Trustee's Sale was postponed from time to time when IMPERIAL learned that on or around December 21, 1988 an involuntary Chapter 11 proceeding had been commenced against BFP.

14. The involuntary bankruptcy was

dismissed at BFP's own request by Order entered on June 14, 1989.

15. In reliance on said Dismissal Order, IMPERIAL proceeded to hold the Trustee's Sale, on July 112, 1988. The property was sold to third party purchasers for $433,000.00. A cash payment was tendered by the purchasers immediately following the sale, and a Trustee's deed upon sale was executed.

16. IMPERIAL did not have any business relationship with the third party purchasers at any time prior to the Trustee's Sale of the subject property, nor did IMPERIAL receive any benefit by virtue of the fact that the property was purchased by a third party at the Trustee's Sale.

CONCLUSIONS OF LAW

1. BFP has no claim against IMPERIAL under 11 U.S.C. Section 548(a)(2) because there was no transfer of an

interest of property of the Debtor when the property was sold at the sale. This is based on the ground that the Pedersons did not have an interest in the property when they purported to transfer the title to the property to BFP. Therefore, BFP never received good title.

2. Even if a transfer of an interest of property of the Debtor occurred at the sale, a reasonably equivalent value was received in exchange for the transfer, because the nonjudicial foreclosure sale was non-collusive and regularly conducted.

3. The Debtor's Complaint to Declare Transfer of Real Property Null and Void, and to Vacate and Set Aside Trustee's Deed of Trust, and for Damages fails to state a claim upon which relief can be granted against Movant and said Complaint is hereby dismissed with prejudice as to Movant.

Dated: 10 JUL 1990

JOHN E. RYAN
UNITED STATES BANKRUPTCY JUDGE

COPY OF DECISION OF DISTRICT COURT
(NOT PUBLISHED)

FILED APR 8, 1991
ENTERED APR 9, 1991
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	)	
	)	No. SA CV 90-
BFP, a Partnership,	)	436-LTL
	)	
Debtor.	)	
	)	
BFP, a Partnership,	)	DECISION
	)	
Appellant,	)	
	)	
vs.	)	
	)	
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY, and DOES 1 to 10,	)	
	)	
Appellees.	)	

This matter is here on a timely appeal by Appellant BFP, a Partnership ("BFP") from a March 6, 1990 Order of the

U.S. Bankruptcy Court dismissing an adversary complaint of BFP with prejudice. Jurisdiction is found pursuant to 28 U.S.C. Section 158(a).

In our view the Bankruptcy Court's findings of facts stated in the Order are not clearly erroneous. We also conclude after de novo review that the court below has ascertained and applied the existing law of this Circuit correctly in reaching its legal conclusions and its decision.

The March 6, 1990 Order of the Bankruptcy Court accordingly is affirmed.

DATED: This 8th day of April, 1991.

Lawrence T. Lydick
United States District Judge

copies to:

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Michael R. Sment
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HONORABLE JOHN E. RYAN
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Room 506
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COPY OF ORDER OF DISTRICT COURT
ON MOTION FOR REHEARING
(NOT PUBLISHED)

FILED MAY 6, 1991
ENTERED MAY 6, 1991
CLERK, US. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA OFFICE

In re:	)
BFP, a Partnership,	) No. SA CV 90-436-LTL
Debtor.	) THIS CONSTITUTES NOTICE OF ENTRY AS REQUESTED BY FRCP. RULE 77(D)
BFP, a Partnership,	)
Appellant,	)
vs.	) O R D E R
PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,	)
Appellees.	)

This matter is here on a motion by appellant BFP, a Partnership, ("Appellant") for rehearing of its appeal of the bankruptcy court's ruling.

Appellant's request for a rehearing of its appeal is premised on Bankruptcy

Rule 8015 which provides that a motion for rehearing may be made within ten days after entry of judgment on an appeal from the bankruptcy court. Such a motion should be denied absent proof of the existence of specific points of law or fact overlooked or misapprehended by the Court. Armster v. U. S. District Court, 806 F.2d 1347, 1356 (9th Cir. 1986); see also Federal Rule of Appellate Procedure 40(a).

Appellant asserts that this Court's decision was in fact based on a clear error of law. The two arguments offered by appellant in support of its motion fail to justify this claim. Specifically, appellant requests that the Court grant a rehearing so that the Court can "consider the soon-to-be-decided decision by the Bankruptcy Appellate Panel as to what the law of the 9th Circuit is." However, appellant does not

explain how this Court's failure to postpone its decision until after a decision by the BAP on a separate appeal may have resulted in a misapplication of the law. Appellant also has not shown that this Court would have been bound by the BAP's decision if it had preceded this Court's ruling. Similarly, appellant has not demonstrated that any subsequent decision by the BAP will invalidate this Court's decision.

The second ground relied on by appellant in support of its motion for a rehearing is the Court's alleged failure to consider the decision in In re Tome, 113 B.R. 626 (Bankr.C.D.Cal. 1990). In Tome a bankruptcy court held that a foreclosure sale could be set aside where a chapter 13 debtor received insufficient notice of a pending foreclosure sale. Appellant contends that the debtors in this action likewise received insuffi-

cient notice of the foreclosure sale for their property. Appellant asserted this point for the first time during oral argument without explanation for its failure to include it in its opening brief. In any event, the facts and law in Tome are clearly distinguished from those of the instant action.

Appellant thus fails to establish that the Court either misapplied or overlooked any point of law when it affirmed the bankruptcy court's ruling. In addition, appellant's motion offers no new material facts that would alter this Court's original ruling. Accordingly, appellant's motion for a rehearing is denied.

The Clerk of the Court will serve copies of this Order by United States mail upon counsel of record.

DATED: This 6 day of May, 1991.

Lawrence T. Lydick
United States District Judge

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COPY OF OPINION OF THE BAP

FILED
November 5, 1991 cd
NANCY B. DICKERSON, CLERK
U. S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE

PANEL FOR THE NINTH CIRCUIT

In re:	) BAP No.
	) CC-90-1712-JVP
BFP, a Partnership,	)
	) Bk. No.
Debtor.	) SA-89-06771-JR
	)
	) Adv. No.
BFP, a Partnership,	) SA-89-0977-JR
	)
Appellant/Plaintiff,	) O P I N I O N
	)
vs.	)
	)
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation,	)
	)
Appellee/Defendant.	)

Argued and Submitted
on March 20, 1992, at Pasadena, California

Filed: NOV. 5, 1991

Appeal from the United States Bankruptcy Court for the Central District of California

Honorable John E. Ryan, Bankruptcy Judge, Presiding

Before: JONES, VOLINN, and PERRIS, Bankruptcy Judges

JONES, Bankruptcy Judge:

Appellee/Defendant Imperial Savings & Loan Association ("Imperial") sold real property at a foreclosure sale. Thereafter Appellant/Plaintiff BFP filed its Chapter 11 petition and brought an adversary suit to avoid the sale as a Section 548(a)(2) transfer for less than reasonably equivalent value. Imperial moved for and was granted summary judgment. BFP appealed. We AFFIRM.

BACKGROUND

In 1987 several parties got together to buy the home of Sheldon and Ann Foreman in Newport Beach, California, planning to remodel and sell it. Wayne Pedersen was to be the purchaser, but after the property entered escrow the agreement was orally changed. Instead of Wayne Pedersen being the sole buyer, a

partnership, BFP, was formed.[1] On August 27, 1987, the Foremans deeded the property to Wayne and Marlene Pedersen, who on the same day deeded the property to BFP. Wayne Pedersen borrowed $356,250[2] from Imperial and BFP borrowed $200,000 [3] from the Foremans to make the purchase--both loans were secured by deeds of trust.

Despite the fact that the Pedersens had conveyed the property to BFP, they subsequently conveyed the property to another entity, Off-Road Vehicles--Recreation & Family Campground, Inc. ("Off-

---

1. The BFP partnership originally consisted of Wayne and Marlene Pedersen and Russell Barton.

2. This loan was secured by a first deed of trust, apparently with Wayne Pedersen as trustor and Imperial's predecessor in interest as beneficiary. The deed was recorded August 25, 1987.

3. This loan was secured by a second deed of trust, apparently with BFP as trustor and the Foremans as the beneficiaries.

Road"). BFP and the Foremans brought suit against Off-Road in state court to quiet title.

Before the state court could decide the case, Imperial entered a notice of default under the first deed of trust and scheduled a properly noticed foreclosure sale. Off-Road prevented the sale by filing an involuntary Chapter 11 petition against BFP. BFP moved to dismiss the involuntary petition, and Imperial moved to lift stay. Both motions were granted on or about June 14, 1989, and the subject property was sold to third parties at a foreclosure sale, apparently without further notice, on July 12, 1989.

Three months later the state court ruled on the quiet title action, rescinding the conveyance between the Foremans and the Pedersens. Thereafter BFP filed a voluntary Chapter 11 petition and brought the instant adversary suit

seeking to nullify the foreclosure sale as a transfer for less than reasonably equivalent value under Section 548(a)(2).

Imperial moved for summary judgment. The bankruptcy court granted the motion, holding that reasonably equivalent value was received at the foreclosure sale and that the foreclosure sale was "regularly conducted.[4]

ISSUE

Whether the bankruptcy court erred in granting Imperial's motion for summary judgment, holding that reasonably equivalent value was received at the foreclosure sale.

---

4. The bankruptcy court also held that BFP lacked any interest in the subject property: if the Pedersens had no interest in the property, then BFP had no interest in the property. The court failed to recognize that the same could be said of Imperial's interest in the property. Therefore, we hesitate to use the state court rescission to determine the interests of these parties or to dispose of this appeal.

STANDARD OF REVIEW

We review the granting of a motion for summary judgment de novo. E.g., In re Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990). We review issues of fact for clear error, and conclusions of law de novo. Pullman-Standard v. Swint, 456 U.S. 273, 277 (1982); Vesey v. United States, 626 F.2d 627, 629 (9th Cir. 1980).

DISCUSSION

Reasonably Equivalent Value

BFP argues that the foreclosure sale should be invalidated or damages awarded pursuant to Section 548(a)(2). BFP argues that the subject property was worth in excess of $700,000, and that the sale prices of $433,000 was not reasonably equivalent value.

The BAP has previously held:

> A non-collusive and regularly conducted nonjudicial foreclosure sale prior to the filing of a bankruptcy case cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes "reasonably equivalent value" as a matter of law.

In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982), aff'd, 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U.S. 833 (1974).[5] In other words, the price

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5. On appeal, the Ninth Circuit found that the foreclosure sale was not a transfer, and therefore did not address the issue of reasonably equivalent value. In re Madrid, 725 F.2d 1197, 1199 (9th Cir. 1984). The 1984 Bankruptcy Amendments determined that a foreclosure sale was, after all, a transfer. However, the BAP rule regarding reasonably equivalent value is still applicable. In Re Ehring, 91 B.R. 897, 901 (9th Cir. BAP 1988), aff'd, 900 F.2d 184 (9th Cir. 1990). Contra In re Lindsay, 98 B.R. 983 (Bankr. S.D. Cal. 1989) (the bid price at a foreclosure sale

received at the foreclosure sale is, by definition, reasonably equivalent value unless the foreclosure sale is not "regularly conducted," or unless there is collusion.

Regularly Conducted Foreclosure Sale

BFP argues that it did not receive proper notice of the foreclosure sale.[6] Since the bankruptcy case had been dismissed, proper notice is determined by looking to California law.

The bankruptcy court made the following findings of fact with respect to the foreclosure sale:

> A Notice of Default was recorded on
>
> ---
> ...Continued...
>
> does not establish reasonably equivalent value).

6. BFP also argues that it did not receive proper notice of the motion to lift stay. Imperial argues convincingly that the dismissal of the involuntary bankruptcy petition made notice under the motion to life stay irrelevant.

> July 29, 1988. A Trustee's sale was originally scheduled for December 29, 1988. Notice of the Sale was published for three consecutive weeks as required by the laws of the State of California.
>
> * * *
>
> Imperial did not have any business relationship with the third party purchasers at any time prior to the Trustee's Sale of the subject property, nor did Imperial receive any benefit by virtue of the fact that the property was purchased by a third party at the Trustee's Sale.

Appellant's Excerpts at 244-45. BFP does not challenge these findings, but merely states that it received no notice. Pursuant to California law, publication for three consecutive weeks is sufficient notice, even under the facts of this case where the sale was postponed due to

bankruptcy, and not renoticed after bankruptcy. See Lupertino v. Carbahal, 35 Cal. App. 3d 742, 746-747, 111 Cal. Rptr. 112, 115 (1973).

BFP next argues a kind of estoppel, stating that it was misled by Imperial into believing that the foreclosure sale would not be held until the state court proceedings had concluded.

> Russell Barton's declaration showed that after the hearing on the involuntary petition (the prior petition) filed by Off-Road, he heard the attorney for appellee [Imperial] say that they would not have the foreclosure sale until after the hearing on the pending quiet title action set for July 17, 1989 . . . .

Appellant's Opening Brief at 11. Such an argument does not state a claim for estoppel. Furthermore, Imperial denies

that there was a verbal agreement, and further argues that a verbal agreement to continue a trustee's sale is unenforceable under California law. Appellee's Opening Brief at 22-23. (quoting Karlsen v. American Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 121, 92 Cal. Rptr. 851, 856 (1971)).

BFP has failed to show that the bankruptcy court erred in concluding that reasonably equivalent value was given for the subject property. Therefore, the bankruptcy court order granting summary judgment is AFFIRMED.

VOLINN, Bankruptcy Judge, Dissenting:

Relying on the majority ruling in In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982), aff'd on other grounds, 725 F.2d 1197 (Ninth Cir. 1984), cert. denied, 469 U.S. 833 (1984), the majority here restates the view that a non-collusive and regularly conducted nonjudicial foreclosure sale creates in effect an irrebuttable presumption that the consideration received at such a sale is "reasonably equivalent value" for purposes of Bankruptcy Code Section 548(a)(2)[1] While stare decisis does not require us to follow the BAP ruling in Madrid since that ruling was not adopted by the Circuit on appeal, it is appropriate that the reasoning of that ruling be considered, as evidenced by the majority in the matter before us.[2]

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1. Bankruptcy Code Section 548(a) provides in pertinent part: The trustee may avoid any transfer of an interest of the debtor in property . . . that was made or incurred within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --

. . . .

2(A) received less than a reasonably equivalent value in exchange for such transfer or obligation;

2. When the BAP's decision in Madrid was appealed, the Ninth Circuit declined to adopt the reasoning of the majority and instead affirmed on the grounds that no "transfer" occurred at the time of the foreclosure sale. 725 F.2d at 1200-01. The Ninth Circuit's ruling thereby became the law of the case in Madrid. Thereafter, the 1984 Bankruptcy Amendments revised the Bankruptcy Code's definition of "transfer," now found at 11 U.S.C. Section 101(54), to make it clear that a foreclosure sale is a transfer. See In re Ehring, 900 F.2d 184, 87 (9th Cir. 1990) (where the Ninth Circuit implicitly acknowledged that Congress in the 1984 Amendments reversed the Madrid holding). It is questionable that the displacement by Congress of the Ninth Circuit Madrid ruling served to revive the BAP Madrid decision. Thus, given this history, the present viability of original Madrid is doubtful. See In re Verna, 58 B.R. 246 (Bankr. C.D. Cal. 1986) ("[i]n overruling the Ninth Circuit's Madrid decision, Congress did not reinstate the Ninth Circuit Bankruptcy Appellate Panel's Madrid decision . . . ").

Since the issuance of this Court's 1982 opinion in Madrid, a substantial body of case law had developed in relation to the meaning of the term "reasonably equivalent value" under Code Section 548(a)(2). There have emerged three approaches. The first is that articulated by the Bankruptcy Appellate Panel's Madrid majority in its 1982 decision. A number of bankruptcy courts and one circuit court have followed the BAP's approach on the Section 548(a)(2) question. In the Matter of Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985); In re Verna, 58 B.R. 246 (Bankr. C.D. Cal. 1986); In re Upham, 48 B.R. 695 (Bankr. W.D.N.Y. 1985); and In re Strauser, 50 B.R. 868 (Bankr. N.D. Ohio 1984).[3]

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3. One of the proposed components of the 1984 Bankruptcy Amendments would have adopted the BAP's Madrid rule and

The second line of cases follows the Fifth Circuit's decision in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980), a case decided under Section 67(d) of the prior Bankruptcy Act. This superseded section held that a fraudulent transfer was one where the debtor did not receive "fair consideration," as opposed to the Code's use of the term "reasonably equivalent value." The trial court had found no fraudulent conveyance in a foreclosure sale price which was 57.7% of fair market value. The Fifth Circuit reversed and noted that it found no case in which a court had approved a transaction where property

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...Continued...

established an irrebuttable presumption of reasonably equivalent value in the event of a regularly conducted non-collusive foreclosure sale. The Congress declined to adopt the proposal without explanation and, consequently, the legislative history in this regard is inconclusive.

sold for less than 70% of fair market value. This reasoning has come to stand for a somewhat mechanical analysis of determining whether the price paid at a foreclosure sale is "an acceptable percentage of the fair market value of the property." In re Bundles, 856 F.2d 815, 820 (7th Cir. 1988). The Durrett court's approach has been followed by courts outside the Fifth Circuit. E.g., In re Thrifty Dutchman, Inc., 97 B.R. 101 (Bankr. S.D. Fla. 1988); In re Cole, 81 B.R. 326 (Bankr. E.D. Pa. 1988); Matter of IPI Liberty Village Assoc., 92 B.R. 882 (Bankr. W.D. Mo. 1987).

The third line of cases may now be described as a majority position. The leading cases is In re Bundles, 856 F.2d 815 (7th Cir. 1988). That case reflects, in my view, what should be the law in this area. The Seventh Circuit held:

> In our view, in defining reasonably equivalent value, the court should neither grant a collusive presumption in favor of a purchaser as a regularly conducted, non-conclusive foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value. Reasonable equivalence should depend on all the facts of each case.

Id. at 824. Thereafter, the court stated that "[i]t would be appropriate to permit a rebuttable presumption that the price obtained at the foreclosure sale represents reasonably equivalent value" (emphasis in original); that the foreclosure transaction must be examined "in its totality," and specified some of the factors to be considered: "whether there was a fair appraisal of factors to be considered; "whether there was a fair appraisal of the property, whether the

property was advertised widely, and whether competitive bidding was encouraged." Id. This analysis has been adopted, in one form or another, by the courts of appeals for three other circuits that have considered the question. In re Morris Communication NC. Inc., 914 F.2d 458 (4th Cir. 1990); In re Littleton, 888 F.2d 90 (11th Cir. 1989); and In re Hulm, 738 F.2d 323 (8th Cir. 1984), cert. denied, 469 U.S. 990 (1984). Many district and bankruptcy courts follow this case-by-case approach as well. E.g., In re Brown, 119 B.R. 413 (S.D.N.T. 1990); In re Barrett, 118 B.R. 255 (E.D Pa. 1990); In re Pittsburgh Cut Flower Co., Inc., 124 B.R. 451 (Bankr. W.D. Pa. 1991); In re Garrison, 48 B.R. 837 (D. Colo. 1985); In re DeVito, 111 B.R. 529 (Bankr. W.D. Pa. 1990); In re National Environmental Systems Corp., 111 B.R. 4 (Bankr. N.D.H. 1989); In re Lindsay, 98

B.R. 983 (Bankr. S.C. Cal. 1989); In re General Indus., Inc., 79 B.R. 124 (Bankr. D. Mass.1987; In re Pruitt, 72 B.R. 436 (Bankr. E.D.N.Y. 1987). There are variants to re-examination of consideration, as in the case of Barrett v. Commonwealth Federal S&L Assoc., 939 F.2d 20 (3d Cir. 1991) holding that the sale price was subject to a reasonably equivalent test but that the reasonable value was to be measured by other sheriff's sales and not private sales.

In the present case, the trial court utilized Madrid's irrebuttable presumption analysis and therefore did not develop the record in the manner envisioned by the Seventh Circuit in circumstances, I would reverse the bankruptcy court's finding that no fraudulent conveyance occurred, and remand the case for further factual development of the totality of the circumstances relating to the

foreclosure sale.

I therefore respectfully dissent.

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Constitution, Article 1,
Section 8, clauses 1 and 4

"The Congress shall have power to . . . establish . . . uniform laws on the subject of bankruptcies throughout the United States; . . ."

11 U.S.C. Section 101 and 101(54)
now shown as [58](54)

"101. Definitions. In this title . . . 'transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;"

11 U.S.C. Section 548
[except (d)(2)(D) enacted in 1990]

Fraudulent transfers and obligations

"(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily --

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a

transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this

section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permit such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of

the petition.

(2) In this section --

(A) 'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker[,] financial institution [,] or securities clearing agency that receives a margin payment, as defined in section 741[5] or 761[15] of this title, or settlement payment, as defined in sections 101(34), 741(5), 761(15) of this title, or settlement payment, as defined in section 101(35) or 741(8) of this title, takes for value to the extent of such payment; and

(C) a repo participant that receives a margin payment, as defined in section

741(5) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment."

11 U.S.C. 1107 **Rights, powers, and duties of debtor in possession**

"(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106a) (2), (3), and (4) of this title, of a trustee serving in a case under this chapter."

COPY OF PART OF AVOIDANCE OF FORECLOSURE SALES AS FRAUDULENT CONVEYANCES; ACCOMMODATING STATE AND FEDERAL OBJECTIVES

by SCOTT B. EHRLICH

71 Va.L.R. 932, pages 965-967

"The determinants of forced sale value, however, depend entirely on the state mechanisms for realization of debt collateral. Evidence of forced sale value inevitably requires that the federal courts afford substantial weight to the price actually received at the sale and at regularly conducted, noncollusive sales of similar properties in the same geographical region. Of course, Madrid suggested exactly this approach, yet state foreclosure procedures remain so poorly designed that the price received at foreclosure sales rarely represents a true maximum forced sale value. The solution to this quandary is to shift the

inquiry from comparisons of value received in any particular case to the adequacy of state procedures in achieving an optimum price for the property under the inhibiting circumstances of a forced sale.

The reasoning in Lawyers Title Insurance Corp. v. Madrid[94] is sound, but incomplete, as is the reasoning in Durrett. Madrid adherents correctly assert that in the context of a forced sale, the determination of "reasonably equivalent value" should be closely linked to the actual bid received at a noncollusive, regularly conducted sale.[95] But this approach is only valid if state procedures are properly designed to generate competitive bidding for the

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94. 21 Bankr. 424 (Bankr. 9th Cir. 1982), aff'd, 725 F.2d 1197 (9th Cir.), cert. denied, 105 S.Ct. 125 (1984).

95. See supra note 8 for courts following Madrid.

property. Durrett adherents are equally correct in asserting that section 548(a)(2) requires a comparison between the price received at the foreclosure sale and the actual value of the property. This view, however, is only appropriate if state procedures are inadequately designed to maximize the sale price of the property, given the involuntary nature of the sale and the state's interest in assuring mortgages an expeditious and final mechanism for resorting to their collateral.

Recognizing the flaws in the Madrid and Durrett approaches to section 548(a)(2) is the first step in accommodating both state and federal objectives. In applying the presumptive fraud provisions of the Bankruptcy Code, federal courts must be sensitive to the context in which the transfer occurred and the disruptive effects of postforeclosure

avoidance on real estate transactions. The courts should limit the scope of section 548(a)(2) review to an initial evaluation of the state foreclosure procedures, rather than to the quantitative sufficiency of the bid received at sale. If the procedures were adequately structured to produce a competitive bid and the sale was regularly conducted, federal courts should presume that the amount paid for the debtor's interest was reasonably equivalent, regardless of any disparity between retail market value and the price bid at the sale. Under this approach, the interests of debtors cannot be involuntarily transferred under state law free from recapture under section 548(a)(2) except under circumstances structured to maximize the value given in exchange for the property.

Moreover, the state's concern for stability and finality can be satisfied

where the state has adopted foreclosure procedures that maximize sale value and offer to the debtor's creditors the protections of a marketplace transaction. If the foreclosure procedures are value-maximizing, purchasers at foreclosure sles need not be unduly concerned about the possibility of subsequent rescission under the presumptive fraud provisions of section 548(a)(2). By definition, the value paid reflects the best value achievable under the circumstances of a forced sale. Determining the sufficiency of state foreclosure procedures will not require a case-by-case analysis; instead, this inquiry into foreclosure procedures will generate rules of law on which future market participants can rely. Moreover, if state procedures are upgraded to market the property effectively and to increase the number of prospective purchasers attending the sale, the value

paid by the highest bidder will be closer to the nonforced-sale fair market value of the property, thus reducing further the justification for avoiding the sale as a fraudulent conveyance.

This approach will impose a double burden on the bankruptcy trustee. The trustee will have to meet the initial burden of proving that state foreclosure procedures are insufficiently structured to produce a maximum forced sale price. Where state foreclosure procedures are inadequate, the trustee must also prove that the sale price was less than a reasonably equivalent value. In making this determination, however, the courts must recognize that due to the failings of state procedures, no rational forced sale value is available for comparative use, and the courts should apply section 548 strictly, using the retail market value of the proeprty for comparative

purposes. Although this may allow trustees occasionally to succeed in their current efforts to avoid foreclosures, if enforcement of section 548 induces state legislatures to upgrade foreclosure procedures, the trustee's ability to avoid fraudulent conveyances under section 548 eventually will be diminished and the spectre of unstable foreclosure-acquired titles removed. Such a scenario is highly desirable and the federal courts should continue, as many have done, to enforce section 548 in accordance with its terms until state procedures are revamped."

JURISDICTION OF INTERVENING COURTS

The District Court had jurisdiction of the appeal from the Order of the Bankruptcy Court dismissing as to PAUL OSBORNE and other individual defendants. The Order of the Bankruptcy Court was entered on March 8, 1990, and the "Second Notice of Appeal" was filed on March 14, 1990. The District Court had jurisdiction under 28 U.S.C. Section 158(a) and Bankruptcy Rule 8001(a).

The Bankruptcy Appellate Panel (BAP herein) had jurisdiction of the appeal from the Summary Judgment and Judgment on the Pleadings in favor of Imperial Savings & Loan Association. That Summary Judgment was entered on July 10, 1990 and the Notice of Appeal was filed on July 20, 1990. Jurisdiction of the BAP is provided by 28 U.S.C. Section 158(b) and Bankruptcy Rule 8002.

The Court of Appeal had jurisdiction

of the appeal from the District Court. The District Court's Decision was entered April 8, 1991. A Motion for Rehearing was filed on April 12, 1991, and the latter was denied by Order entered May 6, 1991. The Notice of Appeal was filed on May 9, 1991. The Court of Appeal's jurisdiction is provided by 28 U.S.C. Section 158(d) and the appeal was timely under Rules of Appellate Procedure Rule 4(a) and (b) and Bankruptcy Rule 8015.

The Court of Appeal had jurisdiction of the appeal from the BAP. The latter's Opinion was filed November 5, 1991 and the Notice of Appeal filed November 15, 1991. The Opinion of the BAP is an appealable order as provided in 28 U.S.C. Section 158(a) and (b), and Appellate jurisdiction in the Court of Appeal is provided in 28 U.S.C. Section 158(d).

PROOF OF SERVICE

I am a resident of the County of Orange, State of California; I am over the age of 18 years and not a party to the within action. My business address is 113 Via Venezia, Newport Beach, CA 92663.

On February 15, 1993, I served the foregoing document described as PETITION FOR WRIT OF CERTIORARI AND APPENDIX on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michael R. Sment, Esq., Rich & Ezer, 1888 Century Park East, Suite 2020, Los Angeles, CA 90067

Robert F. Kidd, Esq., Graham & James, 1 Maritime Plaza, Suite 300, San Francisco, CA 94111

(XX) By depositing such envelope(s) and contents, with postage thereon fully prepaid, in the United States mail, at Newport Beach, CA addressed as shown above.

Executed on February 15, 1993, at Newport Beach, California.

I declare that I am a member of the bar of this Court or am employed in the office of a member of the bar of this court at whose direction the service was made.

_____
ROY B. WOOLSEY

127:bfpsc.p88;.cov;tbs

Supreme Court, U.S.
FILED
APR 22 1993
OFFICE OF THE CLERK

No. 92-1370

In the Supreme Court of the United States

OCTOBER TERM, 1992

BFP, PETITIONER

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the consideration received from a noncollusive foreclosure sale that is conducted in conformance with applicable state law constitutes "reasonably equivalent value" under 11 U.S.C. 548(a)(2)(A).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1370

BFP, PETITIONER

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 974 F.2d 1144. The opinion of the bankruptcy appellate panel (Pet. App. 49-68) is reported at 132 B.R. 748. The opinions of the district court (Pet. App. 41-43, 44-48) and the bankruptcy court (Pet. App. 33-40) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24-25) was entered on September 8, 1992. A petition for rehearing was denied on November 17, 1992. Pet. App. 26-27. The petition for a writ of certiorari was filed on February 16, 1993 (a Tuesday following a Monday

holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 27, 1987, Sheldon and Ann Foreman conveyed the real property at issue in this case to Wayne and Marlene Pedersen, who on the same day conveyed the property to petitioner (a partnership in which the partners were the Pedersens and Russell Barton). Petitioner received title subject to a first lien in favor of Imperial Savings and Loan Association, to secure payment of a loan of $356,250 made to the Pedersens to enable them to purchase the property. When petitioner failed to make timely payments on the loan, Imperial commenced foreclosure proceedings under state law. The foreclosure proceedings eventually were completed at a foreclosure sale on July 12, 1989, at which respondent Paul Osborne purchased the property for $433,000. Pet. App. 3-7.

2. Petitioner then filed for bankruptcy. In the bankruptcy case, petitioner instituted an adversary proceeding attempting to set aside the conveyance of the property to Osborne at the foreclosure sale; petitioner argued that the sale was a fraudulent conveyance that the bankruptcy court was empowered to avoid under 11 U.S.C. 548(a)(2). The bankruptcy court granted summary judgment against petitioner. Pet. App. 33-40. The court explained that the sale could not be avoided, reasoning that "a reasonably equivalent value was received in exchange for the transfer, because the nonjudicial foreclosure sale was noncollusive and regularly conducted." *Id.* at 39; see 11 U.S.C. 548(a)(2)(A) (permitting avoidance of a transfer

only if the debtor "received less than a reasonably equivalent value in exchange for such transfer").

3. The district court affirmed in a short order explaining that "the court below has ascertained and applied the existing law of this Circuit correctly in reaching its legal conclusions and its decision." Pet. App. 41-43.

4. The bankruptcy appellate panel affirmed. Pet. App. 49-68. Applying the analysis of its decision in *In re Madrid*, 21 B.R. 424 (Bankr. 1982), the panel stated that

> [a] non-collusive and regularly conducted nonjudicial foreclosure sale prior to the filing of a bankruptcy case cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes "reasonably equivalent value" as a matter of law.

Pet. App. 54-55. The panel then rejected petitioner's claims that the sale in this case was not regularly conducted. *Id.* at 56-59.[1]

5. The court of appeals affirmed. Pet. App. 1-23.[2] Viewing the issue as "a close one," the court adopted the view of the Sixth Circuit that the consideration

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[1] Bankruptcy Judge Volinn dissented. Pet. App. 60-68. He argued that the panel should adopt the reasoning articulated by the Seventh Circuit in *Bundles* v. *Baker* (*In re Bundles*), 856 F.2d 815, 820 (1988), under which there is a rebuttable presumption that the price obtained at a noncollusive foreclosure sale constitutes reasonably equivalent value.

[2] Before the court of appeals rendered its decision, the Resolution Trust Corporation was appointed receiver of Imperial Federal Savings Association, the successor in interest to Imperial Savings and Loan Association.

received at a noncollusive regularly conducted foreclosure sale constituted reasonably equivalent value under Section 548(a)(2)(A). Pet. App. 17-18 (citing *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1139 (6th Cir. 1985)). The court explained that it "necessarily part[ed] from the positions taken by the Fifth Circuit in *Durrett*[v. *Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980)], and the Seventh Circuit in *Bundles*[v. *Baker* (*In re Bundles*), 856 F.2d 815, 820 (1988)]." Pet. App. 18-19. The court explained that "allowing a bankruptcy court to undo a foreclosure sale carries with it the strong potential to destabilize state mortgage transactions" and that it viewed that result as

> untenable from both federal and state perspectives. From a state viewpoint, an ad hoc approach produces intolerable uncertainty regarding the finality of any purchase at a foreclosure sale even if the price paid at the sale is close to, but not equal to, the retail market value. From a federal perspective, this uncertainty undermines the price-maximizing objectives of section 548(a)(2) because potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty.

Id. at 20-21 (internal quotation marks omitted). Noting this Court's admonition that "interpretation of federal statutes should be tempered with due regard for traditional state areas of regulation," *id.* at 22 (citing *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-2618 (1992)), the court held that the price received at a noncollusive, regularly conducted foreclosure sale establishes reasonably equivalent value for purposes of Section 548(a)(2)(A).

DISCUSSION

Petitioner argues that the court of appeals erred in holding that the price received at a noncollusive regularly conducted foreclosure sale constitutes "reasonably equivalent value" for purposes of 11 U.S.C. 548(a)(2). We believe the court of appeals was correct, but because other courts of appeals have reached contrary results on the question, it would be appropriate for the Court to grant the petition.

1. Section 548(a)(2) of the Bankruptcy Code, 11 U.S.C. 548(a)(2), grants trustees in bankruptcy the power to avoid certain transfers made "within one year before the date of the filing of the petition," if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. 548(a)(2)(A). Petitioner contends that a debtor whose property has been sold at a public foreclosure sale that conformed in every way to the requirements for such a sale under applicable state law subsequently can reclaim the property by arguing that the price received at the public auction was not "reasonably equivalent" to the value of the property. We do not agree.

The price received at the foreclosure sale is the best available evidence as to a "reasonably equivalent" value for the property. The foreclosure sale is a public auction at which any party who wishes to do so is free to bid, and is conducted in accordance with the procedures prescribed by state law for the liquidation of debts against real property. To allow a debtor to attempt to prove in court months later that the

collateral at the time of the sale had a value that neither the debtor nor any other party was willing to pay at the time of the sale turns any reasonable notion of value on its head.[3]

Moreover, a rule allowing federal bankruptcy courts to overturn foreclosure sales conducted in accordance with state law fails to take account of this Court's perception that the Bankruptcy Code generally displays a consistent respect for the rules of state property law, which Congress generally has allowed to remain in force except where "some federal interest requires a different result." *Butner* v. *United States*, 440 U.S. 48, 55 (1979); see *ibid.* (courts should avoid granting "a windfall merely by reason of the happenstance of bankruptcy") (internal quotation marks omitted). As the Court has explained, "[w]e do not read these statutory words with the ease of a computer," but must allow notions of "our federalism * * * [to] influence our interpretation of the Bankruptcy Code." *Kelly* v. *Robinson*, 479 U.S. 36, 49

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[3] On this point, it is important to note that the statute in question refers not to "fair market" value—as the Code does elsewhere, *e.g.*, 11 U.S.C. 522(a)(2)—but to "reasonably equivalent" value. By rejecting the concept of "fair market value"—which would have indicated the value the property would have brought in a transaction between a willing buyer and a willing seller, neither being under any compulsion to buy or sell—Congress necessarily required courts to accept transactions that brought a lesser value, provided that the lesser value was "reasonably equivalent." In our view, the concept of reasonableness in this area must account for the consideration that the debtor's failure to satisfy its financial obligations has made a prompt liquidation of the property necessary to satisfy the creditor's contractual right to repayment.

(1986) (internal quotation marks omitted). A rule allowing federal courts to overturn foreclosure sales that are conducted in accordance with state law does not afford sufficient weight to the State's legitimate interest in promulgating norms for the creation and enforcement of interests in real property.

Finally, a contrary rule would undermine the stability that benefits both debtors and creditors, inside and outside of bankruptcy proceedings. The rule sought by petitioner would lead to the result that no purchaser at a foreclosure sale could be sure that it had received clear title to the property, no matter what it paid. That result necessarily would give individuals considering a purchase at a foreclosure sale an incentive to bid less than they otherwise would, an incentive that ineluctably leads to lower revenues for debtors and hence less funds with which to repay the debts owed other creditors.

The Bankruptcy Code does not prescribe a method for federal courts to use in determining what is a "reasonably equivalent" value, and thus does not by its terms require federal courts to overturn the mechanisms established under state law for placing a value upon collateral at foreclosure. In light of our country's long tradition of state-law preeminence in crafting rules for the creation and enforcement of interests in real property, this should be no surprise. Given the importance of stability and predictability in commercial transactions, the most reliable method for ascertaining the "reasonably equivalent" value in this context is to rely on the value obtained at a public auction conducted in accordance with state law. The court of appeals correctly adopted that method.

2. Petitioner correctly states that the courts of appeals have reached divergent results on the question presented. Pet. 10-14. Two courts of appeals have adopted the position set forth above: the Ninth Circuit in this case and the Sixth Circuit in *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1139-1140 (1985). A second approach was adopted by the Fifth Circuit in *Durrett* v. *Washington National Insurance Co.*, 621 F.2d 201 (1980), under which a foreclosure sale can be overturned if the price is not sufficiently close to the fair market value of the property. See *id.* at 203 (noting that it had found no case that had "approved the transfer for less than 70 percent of the market value of the property"). Finally, the Seventh Circuit in *Bundles* v. *Baker* (*In re Bundles*), 856 F.2d 815 (1988), rejected both of those approaches and adopted what it characterized as a "middle ground" under which "[r]easonable equivalence should depend on all the facts of each case." *Id.* at 824. That rule has been adopted by three other courts of appeals. See *Barrett* v. *Commonwealth Federal Savings and Loan Association*, 939 F.2d 20, 24 (3d Cir. 1991); *Cooper* v. *Ashley Communications, Inc.* (*In re Morris Communications NC, Inc.*), 914 F.2d 458, 466-467 (4th Cir. 1990); *Grissom* v. *Johnson* (*In re Grissom*), 955 F.2d 1440, 1445-1446 (11th Cir. 1992).[4]

[4] The Eighth Circuit also has rejected the Ninth Circuit's approach, although it is not clear whether it follows the *Durrett* approach or the *Bundles* approach. *First Federal Savings & Loan Association* v. *Hulm* (*In re Hulm*), 738 F.2d 323, 327 (8th Cir.), cert. denied, 469 U.S. 990 (1984).

In light of the fact-specific nature of the tests articulated by the Fifth and Seventh Circuits, it is difficult to be certain that this case—or any other case—ultimately would have been decided differently under the rules that prevail in those circuits. It is clear, however, that in those circuits a factual hearing would have been required at which the debtor would have had an opportunity to overturn the foreclosure sale. Under the rule articulated by the Ninth Circuit in this case, the debtor in this case had no such opportunity, and it therefore is probable that panels in the Fifth and Seventh Circuits would have reversed the judgment of the bankruptcy court in this case.

As the number of decisions in the courts of appeals attests, the question presented in the petition recurs with considerable frequency. It also has a significant impact on the bankruptcy cases in which it arises; for example, petitioner alleges that the property at issue here was undervalued by more than a quarter of a million dollars. Pet. 6. Given the pronounced divergence of the analysis of the courts of appeals on the question, it does not appear likely that the lower courts will reach a unanimous view on the question. Accordingly, review by this Court would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1993

No. 92-1370

Supreme Court, U.S.
FILED
APR 26 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

In Re: BFP, a Partnership,
Debtor.

BFP, a Partnership,
Petitioner,

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,
Respondents

On Amended Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ AND RICHARD MARCZ

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QUESTIONS PRESENTED FOR REVIEW
(Rule 14.1(a))

Respondents believe that the only proper question for review is:

Did the United States Court of Appeals for the Ninth Circuit err in concluding that "the price received at a noncollusive regularly conducted foreclosure sale establishes irrebuttably reasonably equivalent value under 11 U.S.C. § 548(a)(2)(A)"?

LIST OF ALL PARTIES
(Rule 24.1(b))

Petitioner:

BFP, a Partnership.

Respondents:

Paul Osborne; William Little; Dennis Roy; Arthur Ritz; Jose Cruz; and Richard Marcz.

Respondent:

Resolution Trust Corporation as Receiver of Imperial Federal Savings Association.

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No. 92-1370

In The

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October Term, 1992

In Re: BFP, a Partnership,
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vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents.

On Amended Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ AND RICHARD MARCZ

OPINIONS BELOW

In Re BFP, 974 F.2d 1144 (9th Cir. 1992) (*see* Appendix to Amended Petition herein, p. 1); *In Re BFP,* 132 B.R. 748 (9th Cir. BAP 1991) (*see* Appendix to Amended Petition herein, p. 49).

STATEMENT OF JURISDICTION

Respondents are dissatisfied with Petitioner's Statement.

The decision of the Ninth Circuit Court of Appeals is not in conflict with decisions of other courts of appeals, as cited by Petitioner. In fact, it is in conformity with most of the other decisions cited by Petitioner.

The decision of the Ninth Circuit Court of Appeals is not an important question of federal law. Indeed, the statutory provisions involved must be applied according to the specific laws of the various States.

The decision of the Ninth Circuit interpreted the statutory provision involved according to the plain language of the provision.

STATUTE INVOLVED

The only real statute involved in the decision of the Ninth Circuit Court of Appeals, and pertinently involved herein is: 11 U.S.C. § 548(a)(2)(A). *(See* Appendix to Amended Petition, pp. 69-70).

STATEMENT OF THE CASE

Petitioner has omitted several important substantive and procedural facts from its Statement.

Petitioner was first a debtor in a Chapter 11 bankruptcy case (involuntary) on December 31, 1988.

Imperial Federal Savings Association ("Imperial") (now represented herein by the Resolution Trust Corporation) held the

most senior deed of trust on Petitioner's real property. Because Petitioner had defaulted on its deed of trust payments, Imperial requested, and obtained, relief from the automatic stay, and permission, from the United States Bankruptcy Court to proceed with its pending non-judicial foreclosure and a trustee's (foreclosure) sale.

Then, prior to formal entry of an order on Imperial's behalf, Petitioner voluntarily requested an order dismissing the Chapter 11 bankruptcy case. The order was entered, and the bankruptcy case dismissed, on June 14, 1989.

On July 12, 1989 — almost one month after the first bankruptcy case was dismissed, and over 3 1/2 months before the instant bankruptcy case was commenced — the real property was sold by Imperial at a trustee's (foreclosure) sale.[1] Respondents were the third-party purchasers, paying $433,600 cash. At the time of the sale, the amount owed to Imperial was only $421,815.72. The surplus proceeds were made available to the junior trust deed holders, whose $200,000+ junior deed of trust was extinguished by Imperial's foreclosure sale.

A Trustee's Deed Upon Sale was executed and delivered on July 18, 1989, at which time title to the property became vested in Respondents. Calif. Civil Code §§ 1091, 1053, 1054. On July 21, 1989, the Trustee's Deed was recorded, pursuant to California law, with the Official Records of Orange County.

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1. Although Petitioner, again, refers to facts regarding "notice" (*see* Amended Petition, p. 7), Petitioner's adversary complaint did not seek to have the trustee's (foreclosure) sale set aside based on any lack thereof. Petitioner's adversary complaint did not allege any failure to comply with the strict notice requirements of California statutes. Petitioner expressly admitted to the Bankruptcy Court that it could not allege or prove any failure to comply with any requirement mandated by the comprehensive California statutes governing foreclosures. Petitioner received all the notice(s) required by law.

Two state court actions were then filed, by Petitioner and others, challenging the trustee's (foreclosure) sale. The first action was voluntarily dismissed by Petitioner and others. On October 25, 1989, two weeks after Respondents filed a demurrer challenging the sufficiency of Petitioner's complaint in the other action — and only two days before the hearing on Respondents' demurrer — Petitioner filed this, its second, Chapter 11 bankruptcy case.

On or about November 24, 1989, Petitioner filed its adversary complaint and challenged the trustee's sale, and commenced the proceedings directly below.

On December 14, 1989, the United States Bankruptcy Court vacated the automatic stay in Petitioner's Chapter 11 case "for all purposes" as to Respondents.

On March 6, 1990, after Petitioner admitted that it could not prove any non-compliance with California foreclosure statutes, the United States Bankruptcy Court, on Respondents' motion pursuant to Rule 12(b)(6) F.R.C.P. and Federal Bankruptcy Rule 7012(b), dismissed Petitioner's complaint as to Respondents. That dismissal was subsequently affirmed by both the United States District Court for the Central District of California and the Court of Appeals for the Ninth Circuit (*In Re BFP*, 974 F.2d 1144 (9th Cir. 1992) ("Ninth Circuit's decision below"). (Petitioner's complaint against Imperial proceeded to a summary judgment in Imperial's favor. That judgment was subsequently affirmed by both the United States Bankruptcy Appellate Panel for the Ninth Circuit (*In Re BFP*, 132 B.R. 748 (9th Cir. BAP 1991)) and the Court of Appeals for the Ninth Circuit (*In Re BFP* (9th Cir. 1992)), *supra.)* Pursuant to an order filed on November 17, 1992, Petitioner's petition to the Ninth Circuit for rehearing was denied, and its suggestion for rehearing en banc was rejected. No active Circuit judge requested a vote for a hearing en banc.

SUMMARY OF ARGUMENT

The issuance of a writ of certiorari is a drastic remedy and should not occur herein.

Inasmuch as the real property Petitioner sought to recover has been sold, and as Petitioner failed to obtain a stay pending appeal, this proceeding is moot.

Based on the cases cited by Petitioner, there is no real conflict between the decision of the Court of Appeals for the Ninth Circuit and decisions of other Courts of Appeal.

The intent of Congress as to the meaning or application of the term "reasonable equivalent value", as contained in 11 U.S.C. § 548(a)(2)(A), is not explicit or clear. There is no reason why the laws of the States which do not directly conflict with 11 U.S.C. § 548(a)(2)(A) cannot remain valid and enforceable. Congress has failed to amend 11 U.S.C. § 548(a)(2)(A), or the United States Bankruptcy Code, to prohibit courts from reaching the same conclusion as the Court of Appeals for the Ninth Circuit reached.

It is indisputable that an interest in real property, or a deed of trust, or the mechanics of a foreclosure and foreclosure sale must all be determined, even in a bankruptcy context, according to the laws of the various States. Those laws do vary, and such variety is permissible and common.

It is not error for a federal bankruptcy statute to be interpreted and applied so as to achieve harmony with the laws of a particular State or States. To the contrary, such harmonization is essential and required for the orderly administration of justice.

REASONS FOR DENYING THE WRIT

I.

ISSUANCE OF A WRIT OF CERTIORARI IS A DRASTIC REMEDY AND IS TO BE USED SPARINGLY.

It is beyond dispute that this Supreme Court's exercise of its jurisdiction through a writ of certiorari should be exercised only in cases of grave importance. *Re Woods*, 143 U.S. 202, 206, 12 S. Ct. 417, 36 L. Ed. 125 (1892). The power to issue a writ of certiorari should be used "sparingly" and only where there is "the necessity" to deal with a significant conflict. *Forysyth v. Hammond*, 166 U.S. 506, 513-515, 17 S. Ct. 665, 41 L. Ed. 1095 (1897).

The issue presented herein, regarding the interpretation of 11 U.S.C. § 548(a)(2)(A), is not one of "grave importance". There is no real "necessity" to resolve any conflict between various courts of Appeal because, as noted below, there is no real conflict. No writ of certiorari should be issued herein.

II.

PETITIONER'S PETITION IS MOOT AS IT FAILED TO OBTAIN A STAY PENDING APPEAL AND THE PROPERTY IT SOUGHT TO RECOVER HAS BEEN SOLD.

Petitioner's adversary complaint herein was brought solely pursuant to "Section 548(a)(2)(A) and (B)(i)". That complaint sought to recover the involved real property by declaring the transfer to Respondents null and void, and to set aside the trustee's deed to Respondents. Petitioner's complaint did not pray for monetary damages nor did it seek to recover the value of the real property, as authorized by 11 U.S.C. § 550(a).

Petitioner now admits, however, that the real property (which it has sought to recover) had been sold 3 years ago during the pendency of Petitioner's proceedings herein, and that a deed was recorded evidencing such sale. *See* Amended Petition p. 2, fn. 2.

As indicated by Petitioner's Statement of the Case, and the record, Petitioner never sought a stay (pending appeal herein) as to the Bankruptcy Court's judgment which vacated the automatic stay "for all purposes" as to Respondents.

This appeal, and petition proceeding, are therefore moot. It is well-settled that the failure to obtain a stay pending appeal, and the subsequent transfer of the property involved, render an appeal moot. *Heitmuller v. Stokes*, 256 U.S. 359, 361-62, 41 S. Ct. 522, 65 L. Ed. 990 (1921); *In Re Mann*, 907 F.2d 923, 926 (9th Cir. 1990) — without a stay, an appeal will not affect the rights of a purchaser at a sale occurring during the appeal "even when the purchaser knows of the pendency of the appeal"; *In Re Onouli-Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988); *Valley National Bank of Arizona v. Trustee*, 609 F.2d 1274, 1283 (9th Cir. 1979); *In Re Combined Metals Reduction Co.*, 557 F.2d 179, 190-91 (9th Cir. 1977) — transfers and sales cannot be rescinded or voided where those transactions have been consummated and the purchasers are not parties to the appeal.

Petitioner failed to seek any stay from the Bankruptcy Court below or herein. The property which Petitioner's complaint sought to recover has been sold to purchasers who were never made parties herein. A deed was recorded, as notice to the world, to consummate and evidence that sale. Petitioner's complaint, and this proceeding, to recover that property is now moot.

III.

THERE IS NO REAL CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE OTHER COURTS OF APPEALS' DECISIONS CITED BY PETITIONER.

Petitioner maintains (*see* Amended Petition p. 10) that the Ninth Circuit's decision below is in conflict "with the decision of the Courts of Appeal of five other circuits".

In reality, however, there is no real conflict with those cited decisions. Petitioner has again ignored factual and procedural distinctions in those cited decisions, and has over-broadly and one-sidedly characterized their result.

As to the Fifth Circuit, Petitioner has referred this Supreme Court to decisions in *Durrett v. Washington National Insurance Co. (In Re Durrett)*, 621 F.2d 201 (5th Cir. 1980) and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), *rehrg. denied, cert. denied,* 454 U.S. 1164, 102 S. Ct. 1038 (1981).

Durrett, however, involved the Bankruptcy Act of 1898 ("the Act"), not the Bankruptcy Reform Act of 1978 ("the Bankruptcy Code"). *Durrett* decided the application of § 67d of the Act, which was not at all identical to 11 U.S.C. § 548(a)(2)(A) involved herein (621 F.2d at 202). The only authority relied on by the *Durrett* court, *Schafer v. Hammond*, 456 F.2d 15 (10th Cir. 1972) (*see* 621 F.2d at 203) was also an Act case which did not involve a public sale or public auction (as occurred with the foreclosure sale herein). (456 F.2d at 16, 17). Any determination in *Durrett* as to a test for determining "value" has been repeatedly and correctly characterized as only dictum. *Federal Deposit Insurance Corp. v. Blanton*, 918 F.2d 524, 531 fn. 7 (5th Cir. 1990); *In Re Littleton*, 888 F.2d 90, 92 (11th Cir. 1989); *Matter of Grissom*, 955 F.2d

1440, 1444, 1449 (11th Cir. 1992) — *Durrett* is no longer the law. *Durrett* did not consider the Ninth Circuit's decision below or the prior decision upon which it was based.

Abramson also is an Act case, and did not consider the Bankruptcy Code. *Abramson* also decided the application of § 67d of the Act, which was not at all identical to § 548(a) involved herein. (647 F.2d at 547, 548). *Abramson* did not even involve any issue or determination of "value". Instead, it was focused on the issue of whether the sale therein constituted a "transfer" (647 F.2d at 548, 549). *Abramson* did not consider the Ninth Circuit's decision below or the prior decision upon which it was based, and did not make any determination regarding value.

Indeed, the decisions reached in *Durrett* and *Abramson* have been severely criticized and are not entirely valid anymore. *Federal Deposit Insurance Corp. v. Blanton, supra; Sandoz v. Bennett*, 807 F.2d 1234, 1238 fn. 6 (5th Cir. 1987); *Matter of Grissom, supra; In Re Littleton, supra*).

For the Eighth Circuit, Petitioner has referred this Supreme Court to the decision in *First Fed. Sav. & Loan Ass'n Bismark v. Hulm (In Re Hulm)*, 738 F.2d 323 (8th Cir. 1984), *cert. denied*, 469 U.S. 990, 105 S. Ct. 398 (1984). *Hulm*, however, did not deal with a debtor's complaint to avoid a foreclosure sale under 11 U.S.C. § 548(a), as is involved herein. Rather, a mortgage holder had brought a proceeding to determine that a property was not part of the bankruptcy estate. While the issue of "value" was discussed in *Hulm*, it did not reach a decision interpreting that term nor the language of 11 U.S.C. § 548(a). Instead, the Court of Appeals remanded the case back to the bankruptcy court "for a determination" of value. (738 F.2d at 327). As noted below, such a determination was made by the Bankruptcy Court herein. *Hulm* did not consider the Ninth Circuit's decision below, and it did not expressly disagree with the prior *Madrid* (9th Cir. BAP) decision upon which it was based.

For the Eleventh Circuit, Petitioner has referred this Supreme Court to *Matter of Grissom*, 955 F.2d 1440 (11th Cir. 1992).

Grissom, however, involved a Chapter 13 bankruptcy case not a Chapter 11 as herein. *Grissom* concluded that a determination of reasonable equivalent value pursuant to 11 U.S.C. § 548(a)(2)(A) should be based on an inquiry as to all circumstances. (955 F.2d at 1445). As noted below, such a determination was made in the Bankruptcy Court below. *Grissom* did not, however, disagree with the prior decision, in *Lawyers Title Insurance Corp. v. Madrid (In Re Madrid)*, 21 B.R. 424 (9th Cir. BAP 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), *cert. denied*, 469 U.S. 833, 105 S. Ct. 125 ("prior decision upon which it was based", "*Madrid* (9th Cir. BAP))", on which the Ninth Circuit's decision was based. The *Grisson* Court of Appeals said merely that "we did not go this far in *Littleton* and decline to do so today." (955 F.2d at 1446, fn. 6).

In fact, *Grissom* did agree, similar to the decision herein by the Ninth Circuit, that:

> Absent fraud, collusion, or irregular or unlawful procedures, courts should presume that a legitimate foreclosure sale brings a price which is reasonably equivalent to the property's value.

955 F.2d at 1446.

The *Grissom* court also pointed out that:

> Nullifying a legitimate foreclosure sale . . . may advance bankruptcy policy, but it also violates the policy protecting the rights of secured creditors and diminishes the integrity of foreclosure sales. See, e.g., War Eagle Floats, Inc. v. Travis (In re War Eagle Floats, Inc.), 104 B.R. 398, 400-401 (Bankr. E.D. Okla. 1989); In re Upham, 48 B.R. 695, 697 (Bankr. W.D.N.Y. 1985).

Similar to *Hulm*, the *Grissom* Court of Appeals did not reach a decision interpreting "value" as contained in 11 U.S.C. § 548(a). Instead, the Court of Appeals also remanded the case back to the district court for further proceedings to determine "value". 955 F.2d at 1449. As noted below, such a determination was made in the Bankruptcy Court below. *Grissom* did not consider the Ninth Circuit's decision below, and it did not disagree with the prior decision upon which it was based.

For the Third Circuit, Petitioner has referred this Supreme Court to *Barrett v. Commonwealth Federal Savings Ass'n.*, 939 F.2d 20 (3rd Cir. 1991).

In *Barrett*, however, the parties had stipulated at trial that "value" required by 11 U.S.C. § 548(a)(2)(A) would be interpreted pursuant to the *Matter of Bundles*, 856 F.2d 815 (7th Cir. 1988), standards. As noted below, those factors, required therein to be reviewed, were reviewed hereinbelow.

The *Barrett* Court of Appeals did not espouse its own method for determining "reasonable equivalent value". 939 F.2d at 23.

More importantly, the *Barrett* decision stated that "[r]elief from foreclosure sale under § 548 should be reserved for extraordinary situations where state law and sheriff's office procedures have not been followed. . . ." 939 F.2d at 24-25, fn. 7, 25. Despite arguments relating to "value", the Court of Appeals determined there were no extraordinary circumstances in the case and it allowed the foreclosure sale to stand. 939 F.2d at 25.

Barrett did not consider the Ninth Circuit's decision below

nor the prior decision upon which it was based. *Barrett's* result was exactly the same as has occurred herein, namely that, after an evidentiary review, nothing extraordinary existed which would warrant setting aside the foreclosure sale based solely on the price paid.

Lastly, for the Seventh Circuit, Petitioner has referred this Supreme Court to *Matter of Bundles, supra.*

The difference between *Bundles* and the Ninth Circuit's decision below is purely semantical. In practicalities, they are nearly identical (except where *Bundles* attempts to circumvent State deed of trust[2] and foreclosure laws).

Bundles expressly points out, similar to the Ninth Circuit's decision below, that:

> [T]he bankruptcy court must focus ultimately on the fair market value as affected by the fact of foreclosure. *As a practical matter, the foreclosure sales price is the only means of measuring the effect of foreclosure on the value of property.* Indeed, in usual circumstances, it would be appropriate to permit a rebuttable presumption that the price obtained at the foreclosure sale represents reasonably equivalent value.

856 F.2d at 824 (Emphasis added).

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2. Pursuant to California statutory law, a deed of trust may, identical to a mortgage, contain a private power of sale through foreclosure. Calif. Civil Code §§ 2920(b), 2924, 2924c, 2924g(a). Although trust deeds are preferred in California, the terms "trust deed" and "mortgage" are fairly syonymous. 5 B. Witkin, *Summary of California Law* (9th ed. 1987) "Secured Transactions", § 4, p. 517.

Bundles concludes that a determination for "reasonable equivalence" should be based on all the facts in each case. 856 F.2d at 824.

Hereinbelow, the Bankruptcy Court, in matters concerning Petitioner's complaint and the foreclosure sale, held evidentiary hearings on Respondents' Motion to Dismiss, Respondents' Motion for Relief from Automatic Stay and on Imperial's Motions for Summary Judgment, in addition to numerous adversary and case hearings. The determination by the Bankruptcy Court below considered all the pertinent factors which *Bundles* said should be examined.

The single most important non-price factor as stated by *Bundles* was compliance with state foreclosure sale requirements. 856 F.2d at 825. Hereinbelow, the Bankruptcy Court was apprised by Petitioner that it could not demonstrate that any California requirements were not fully complied with. Upon receiving competent evidence, the Bankruptcy Court also reached a specific judgment that the foreclosure sale was regularly and properly conducted. *See Madrid,* 21 B.R. at 426-427 (9th Cir. BAP) — compliance with state laws is, in accord with bankruptcy purposes, "a safeguard against the evils of private transfers to relatives or favorites."

As to the determination of a fair appraisal (856 F.2d at 824), California foreclosure statutes do not contain a requirement for such a document. *See* Calif. Civil Code §§ 2924 *et seq.* ("the California foreclosure statutes"); §§ 2924f, 2924g, 2924h — no appraisal is required for a foreclosure (trustee's sale). California nonjudicial foreclosure sales are sales which are governed by the highest price received at a public sale. *See* Calif. Civil Code §§ 2924h(c) — property is sold based on "the last and highest bid". As such, the appraisal factor is of no consequence.

In any event, the Bankruptcy Court herein was presented with Petitioner's bankruptcy schedules, adversary pleadings and self-serving declarations as to the property's alleged value. Apparently Petitioner submitted no appraisals.

As to determining advertising for the sale (856 F.2d at 824), California foreclosure statutes contain strict comprehensive requirements for noticing, posting and advertising. *See* Calif. Civil Code §§ 2924, 2924b, 2924c, 2924f — publication in a "newspaper of general circulation" once a week for 20 days; *see also,* R. Powell, *The Law Of Real Property* , § 466, p. 37-316 (1993) — all such prerequisites for sale are established by local law. As such, the only noticing and advertising required is that contained in the foreclosure statutes. *United States Cold Storage v. Great Western Sav. & Loan Ass'n,* 165 Cal. App. 3d 1214, 1229-30 (1985); *Strutt v. Ontario Sav. & Loan,* 28 Cal. App. 3d 866, 877 (1972). The Bankruptcy Court was presented with evidence of compliance with the California foreclosure statutes, which Petitioner could not refute.[3]

As to determining whether competitive bidding was encouraged (856 F.2d at 824), the Bankruptcy Court was presented with evidence of obvious overbidding. Respondents' highest bid price was over $11,780 higher than the amount actually due on Imperial's foreclosed-upon deed of trust. That $11,780 surplus was made available to the holders of a $200,000 deed of trust in a junior

3. It is with this factor in particular, but also possibly others (*e.g.*, appraisal requirement), where other courts have interpreted *Bundles* (and particularly its use of the word "widely") (856 F.2d at 824) to require foreclosure sale actions and conduct to exceed the precise mandates under the comprehensive foreclosure laws of the States. *See In Re Lindsay,* 95 B.R. 983, 991 (Bk. S. D. Cal. 1989); *see also, In Re Kachanizadeh,* 108 B.R. 734, 738 — *Lindsay* violated *stare decisis* and was an improper decision. Imposing additional sale requirements will thus create a conflict, and result in tension, with the specific State laws of foreclosure.

position to Imperial's deed of trust. *See In Re Littleton, supra,* 888 F.2d at 93-94 — reasonable equivalent value has clearly been paid when junior liens are also extinguished by the foreclosure sale.

In addition, the California foreclosure statutes require and encourage competitive bidding. Calif. Civil Code § 2924h; *see* § 2924h(g) — the fixing or restraining of bidding can result in fines and imprisonment; *Block v. Tobin,* 45 Cal. App. 3d 214, 221 (1975); R. Powell, *The Law Of Real Property,* § 439, p. 37-14 (1993).

Thus, at several stages and evidentiary hearings, the Bankruptcy Court below was presented with ample evidence as to all the *Bundles'* factors, which sufficiently demonstrated that a reasonably equivalent value was paid by Respondents at the foreclosure sale herein. The examination of all relevant circumstances, as required by *Bundles,* was made by the Bankruptcy Court herein. Therefore, as mandated by *Bundles* "we must accord [the Bankruptcy Court's determination] great deference." 856 F.2d at 825.

While the Court of Appeals in *Bundles* might disagree with the wording of the Ninth Circuit's opinion below, it could not disagree with the result herein. That result, of upholding the foreclosure sale, was derived herein from the same type of examination and analysis called for in *Bundles.*

There is no real conflict among the different courts of appeal which would necessitate, or justify, the issuance of a writ of certiorari herein.

IV.

CONGRESS DID NOT EXPRESSLY PROVIDE FOR A METHOD OF, NOR DID IT EXPRESSLY PROHIBIT STATE FORECLOSURE LAWS FROM BEING CONSIDERED IN, DETERMINING VALUE PURSUANT TO 11 U.S.C. § 548(a)(2)(A).

There is very little legislative history, and less congressional guidance, as to the phrase "reasonable equivalent value" as set forth in 11 U.S.C. § 548(a)(2)(A). *See Madrid v. Lawyers Title Insurance Corp. (In Re Madrid)*, 725 F.2d 1197, 1199-1200 (9th Cir. 1984) ("*Madrid* (9th Cir.))."[4]

The Historical and Revision Notes to § 548, "Notes of Committee on the Judiciary", Senate Report No. 95-989, pertinently states merely that

> Transfers made for less than a reasonable equivalent consideration are also vulnerable. . . .

As noted in the *Littleton* decision, *supra:*

4. Respected commentators have noted historically that, the philosophical predecessor to § 548(a) of the Bankruptcy Code was § 67d of the Act. *Id.; In Re Littleton, supra,* 888 F.2d at 92 fn. 5. The "present fair equivalent value" requirement of § 67d had the same meaning as the "present value" requirement of § 70d (now, § 549) of the Act. 4B Moore & King, *Collier On Bankruptcy* ¶ 70.68, p. 750 (14th ed. 1978); *see also,* The English Bankruptcy Act of 1914, § 45(g) — transfers for "present fair equivalent value" were protected. The Uniform Fraudulent Conveyance Act defined "fair consideration" as "a fair equivalent". Hence, the predecessor section to 11 U.S.C. § 548(a) required only a valuable consideration. J. McLaughlin, *Amendment of the Bankruptcy Act* 40 Harv. L. Rev. 583, 614-616 (1927); *see also,* Bankruptcy Act of 1800, § 10 — a bona fide purchase for valuable consideration shall not be invalidated.

> [T]he term "reasonably equivalent value" is not capable of precise computation . . . .

888 F.2d at 93.

Absent an express requirement or direction by Congress, the bankruptcy courts and district courts have the duty to determine "reasonable equivalent value" based on the facts presented to them.

Congress did not expressly restrict or prohibit those courts, in making such a determination from applying, or harmonizing with, the foreclosure and real property laws of the States, nor did it preempt any relevant state laws. *California Federal Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 280-281, 292, 107 S. Ct. 683, 93 L. Ed 2d 613 (1987).

Congress also did not expressly prohibit those courts, in making such a determination, from concluding, after an examination of certain factors, that an irrebuttable presumption as to value may arise. *See,* contra, *Matter of Bundles, supra.*

Indeed, it is indisputable that Congress has regularly and knowingly, in almost 15 years, not taken a position, nor defined any guidelines, despite the assorted decisions regarding "reasonable equivalent value". *In Re Ehring*, 91 B.R. 897, 901 (9th Cir. BAP 1988), *aff'd,* 900 F.2d 184, 189 (1990); *In Re Verna,* 58 B.R. 246, 250, 251 (Bk. C.D. Cal. 1986); *In Re Kachanizadeh, supra*, 108 B.R. at 123.

In addition, despite obviously being aware of it, Congress has never drafted legislation nor created any other prohibition or proclamation to overrule, negate, restrict or weaken the authority and reasoning of the prior decision in *Madrid* (9th Cir. BAP). *Id.* Yet, since that decision in 1982 (over 11 years ago), Congress has

amended the Bankruptcy Code five times (in 1984, 1986, 1988, 1990, 1992). By failing to make revisions in the Bankruptcy Code to overrule *Madrid* (9th Cir. BAP), Congress has tacitly approved that decision. *Lorillard v. Pons*,434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 40 (1978); *In Re Execuair Corp.*, 125 B.R. 600, 602-03, 604 (Bk. C.D. Cal. 1991); *see also, Dewsnup v. Timm*, ___ U.S. ___, 112 S. Ct. 773, 779, ___ L. Ed. 2d ___ (1992) — Congress' bankruptcy amendments are written in view of existing laws and practices.[5]

If any congressional intent exists with respect to determining "reasonable equivalent value" under 11 U.S.C.§ 548(a)(2)(A) it is that Congress had not intended to overrule *Madrid* (9th BAP) or any other decision. In effect, Congress' intent is obviously to leave such determinations to the various courts of appeal, which should apply state foreclosure laws, at least in part. It should also be clear that Congress has not prohibited consideration of, nor preempted, the laws of the States as to foreclosure or real property in any determination as to "reasonable equivalent value".

This Supreme Court should not substitute or impose any other intent as to the making of such determinations. No writ of certiorari should be issued herein.

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5. Congress' seeming partial *nolens volens* overruling of *Madrid* (9th Cir.) through the 1984 Amendments, relating to 11 U.S.C.§ 101, did not affect *Madrid* (BAP) as it was based on different reasoning than *Madrid* (9th). *Dewsnup v. Timm*, ___ U.S. ___, ___, 1125 S. Ct. 773, 779, ___ L Ed.2d ___ (1992); *Muniz v. Hoffman*, 422 U.S. 454, 472, 95 S. Ct. 2178, 45 L.Ed 2d 319 (1975); W. Conant, *Beyond Madrid: Resolving The Conflict Within The Ninth Circuit Regarding § 548(a)(2)(A) And Nonjudicial Foreclosure Sales*, 18 Cal. Bankr. J. 221, 240, 241 (1990).

V.

STATE FORECLOSURE LAWS REGARDING VALUE RECEIVED AT FORECLOSURE SALES DO NOT INTERFERE OR DIRECTLY CONFLICT WITH CONGRESS' INTENT OR THE BANKRUPTCY CODE.

Allowing state foreclosure and property laws to apply[6], or presumptions to be reached by courts as to "value", does not interfere with the overall purposes of the Bankruptcy Code and Congress.

The Bankruptcy Code indisputably provides that a creditor's right to foreclosure is not threatened or terminated by a bankruptcy case, and it is unaffected by any discharge. *Johnson v. Home State Bank*, ___ U.S. ___, 111 S. Ct. 2150, 2153-54 (1991). In particular, the avoidance powers set forth in the Bankruptcy Code are intended to assure an equitable distribution among unsecured creditors, which surely does not mean Congress intended to let those unsecured creditors override the rights of trust deed holders or good faith purchasers. *Matter of Winshaw Settlor's Trust*, 758 F.2d 1136, 1139 fn. 4 (6th Cir. 1985).

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6. Generally, Congress has not attempted, within the Bankruptcy Code, to enact, or preempt the States' laws regarding, foreclosure, mortgages or real property. *Barnhill v. Johnson, supra*, 112 S. Ct. at 1389; *Dewsnup v. Timm, supra*, 112 S. Ct. at 778-779; *Johnson v. Home State Bank, supra*, 111 S. Ct. at 2153; *Farrey v. Sanderfoot*, 500 U.S. ___, 111 S. Ct. 1825, 1829, __ L. Ed. 2d __ (1991); *Grogan v. Garner*, 498 U.S. 279, 657, 111 S. Ct. 654, 657, 112 L.Ed. 2d 755 (1991); *Butner v. United States*, 440 U.S. 48, 54-56, 99 S. Ct. 914, 59 L.Ed. 2d 136 (1978) — unless some federal interest requires a different result, state property law should be applied in bankruptcy; *In Re Rigden*, 795 F.2d 727, 736 fn. 1 (9th Cir. 1986) — state laws determine many rights in bankruptcy cases. Pertinent to Respondents herein and in accord with a majority of State foreclosure laws, the bankruptcy laws have always been intended to protect bona fide purchasers. *See* footnotes 4, *supra*, and 7, *infra*.

The only potential asset lost at a foreclosure sale is the equity, if any, in the property sold. Such equity, however, accrues to the benefit of secured creditors, not debtors or unsecured creditors. *Dewsnup v. Timm, supra,* 112 S. Ct. at 778.

Herein, there was no lost equity. The property was encumbered by a senior trust deed of $421,815.72 and a junior trust deed of at least $200,000, totalling $621,815.72. Respondents purchased the property for $433,000, demonstrating a negative equity of [$-188,815.72]. Indeed, as the junior trust deed was extinguished by the foreclosure sale, Petitioner received a significant benefit. *In Re Littleton, supra,* 888 F.2d at 93-94.

State foreclosure laws, which do not allow foreclosure sales to be set aside solely on the basis of an inadequate price *(see Matter of Winshaw Settlor's Trust, supra,* 758 F.2d at 1139 — such laws are a "well-nigh universal rule"; R. Powell, *The Law of Real Property,* § 468[6], p. 37-332-333 (1993)) do not interfere or conflict with Congress' intent or the goals for bankruptcy cases. Such laws require determinations that: the foreclosure sale was conducted pursuant to statutory procedures; full noticing and competitive bidding occurred; the debt owed on the trust deed was paid; no fraud or collusion was present; no extraordinary circumstances existed; among other things. *Central Nat. Bank v. Bell,* 5 Cal. 2d 324, 328 (1936).

Like determinations are implicit in 11 U.S.C. § 548(a)(2)(A), and are recommended by *Bundles.* As noted above (Section III), such determinations were made by the Bankruptcy Court below, based on a multitude of documents and evidence presented to it. Indeed, the Ninth Circuit's decision below expressly requires findings as to: the lack of collusion or fraud; the propriety of conduct at the sale; compliance with state foreclosure requirements (which include noticing and bidding); and the price paid. These findings will, in addition, necessarily be made in light

of: the debtor's bankruptcy pleadings (setting forth, *inter alia,* assets, debts and asserted property values); the debtor's alleged damages or loss of equity (as required by Rule 7009, Federal Rules of Bankruptcy Procedure and Rule 9(g), F.R.C.P. — claims for damages must be specifically stated); and any other evidence submitted by the parties. Only *after* a determination that the required elements exist can a court conclude, according to the Ninth Circuit, that there is a presumption in favor of the price paid at the foreclosure sale.

Inasmuch as the determinations required by State foreclosure laws, and the determinations required by the Ninth Circuit's decision below, involve various factors which are implicitly to be determined pursuant to 11 U.S.C. § 548(a)(2)(A), and do not interfere or directly conflict with the Bankruptcy Code, they are permissible and not preempted.

The basis for the Ninth Circuit's decision below was proper and no writ of certiorari should be issued herein.

VI.

IT IS NECESSARY TO HARMONIZE FEDERAL BANKRUPTCY LAW WITH EXISTING STATE SUBSTANTIVE LAWS.

As noted herein above (Sections III and IV, *supra*), the Bankruptcy Court made the proper evidentiary determinations implicitly required by the Bankruptcy Code. With the correct result at hand, the Ninth Circuit attempted in its decision below to avoid conflicts with State laws.[7-8] It is concluded that:

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7. Herein, it is well-settled under the laws of California, and other States, that a foreclosure sale may not be set aside based solely on the inadequacy of price absent the showing of some other irregularity. *Central Nat. Bank v. Bell, supra; Kennedy v. Dunn,* 58 Cal. 339, 340 (1881); *Stafford v. Russell,* 117 Cal. (Cont'd)

> [B]y following the *Madrid* formulation we are able to give a reasonable meaning to § 548 without unduly upsetting local real estate markets or state law. Unlike the *Bundles* court, we see the issue as *both* one of statutory interpretation *and* the growing tension between preemption and the requirements of a vigorous federal system .... Thus, by interpreting § 548 in accordance with the *Madrid* formulation, we are able to balance bankruptcy policy and comity concerns.

974 F.2d at 1149.

Other courts of appeal have agreed:

> ... The better view is that reasonable equivalence for the purposes of a foreclosure

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(Cont'd)
App. 2d 326, 333 (1953); *Johnson v. Grant*, 87 Cal. App. 402, 405 (1927); *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963); *Matter of Winshaw Settlor's Trust, supra*, 758 F.2d at 1139 — "well-nigh universal rule". In addition, and particularly pertinent as to Respondents, California foreclosure statutes expressly create a "conclusive presumption" in favor of bona fide purchasers at foreclosure sales. Calif. Civil Code § 2924; *Wolf v. Lipsy*, 163 Cal. App. 3d 633, 639 (1985) — this conclusive presumption is irrebuttable; *Napue v. Gor-Mey West, Inc.*, 175 Cal. App. 3d 608, 613 (1985); *Karrell v. First Thrift of Los Angeles*, 104 Cal. App. 2d 536, 539 (1951).

8. The Ninth Circuit's decision below was also in harmony with other decisions regarding applying State law (*see* footnote 6, *infra*), and decisions interpreting different avoidance sections of the Bankruptcy Code, which decisions also authorized regularly conducted foreclosure sales to stand. *See In Re Ehring*, 91 B.R. 897, 900 (9th Cir. BP), *aff'd*, 900 F.2d 184 (1990) — 11 U.S.C. § 547; *In Re Walker*, 861 F.2d 597 (9th Cir. 1988) — 11 U.S.C. § 549(c), if the purchasers record first.

> sale under § 548(a)(2)(A) should be consonant with the state law of fraudulent conveyances ... No support for this drastic upset of state law and procedures is found in the Bankruptcy Code.

Matter of Winshaw Settlor's Trust, supra, 758 F.2d at 1139-40; *see also, Gottlieb v. McArdle*, 580 F. Supp. 1523, 1525 — under the federal law, a foreclosure sale should be set aside only if the price paid shocks our conscience.

> [I]t is important to interpret the two [bankruptcy law and state law] statutes in a way that minimizes such conflicts and harmonizes the policies that underlie them.

Kapela v. Newman, 649 F.2d 887, 890-91 (1st Cir. 1981).

The Ninth Circuit's decision below does just that, and in a way which does not interfere or conflict with bankruptcy purposes or congressional intent. The Court of Appeals was faced with reconciling an unclear bankruptcy statute with a comprehensive system of state foreclosure laws.[9]

---

9. The Ninth Circuit also understood that a restrictive interpretation could result in undesirable consequences both on a bankruptcy and state level. Indeed, these consequences would be contrary to any price-maximizing objective of the Bankruptcy Code. "It makes little sense to interpret § 548(a)(2)(A) in a way that will likely discourage healthy foreclosure bidding." 974 F.2d at 1148-1149. The chilling effect which could result from a pre-emptive interpretation of 11 U.S.C. 548(a)(2)(A) is obvious and has been widely discussed. *Matter of Grisson, supra*, 955 F.2d at 1446; *Matter of Winshaw Settlor's Trust, supra*, 758 F.2d at 1139; *Abramson v. Lakewood Bank & Trust Co., supra*, 647 F.2d at 550 (dissent); *In Re Verna, supra*, 58 B.R. at 252 — a rule of certainty is necessary to encourage bidders, maximize amounts paid and create a market for sales; S. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objections*, 71 Va. L. Rev. 933, 963-64, 980 (1985).

As the California Supreme Court explained in *I.E. Associates v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 288:

> There are, moreover, persuasive policy reasons which militate against a judicial expansion of those [State statutory] duties. The nonjudicial foreclosure statutes — an alternative to judicial foreclosure — reflect a carefully crafted balance of the interests of the beneficiary, trustors and trustees . . . . In taking all these concerns into account, the statutes strike an overall balance favoring the protection of trustors. (Citations omitted.)

As this Supreme Court has made clear

> Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of that happenstance of bankruptcy." Lewis v. Manufacturers National Bank, 364 U.S. 603, 609. The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee . . . .

Butner v. United States, 440 U.S. at 55.

CONCLUSION

No writ of certiorari should be issued herein.

Petitioner's appeal and this proceeding are moot; the property which Petitioner sought to recover has been transferred.

No actual conflict exists between the various courts of appeal. The Bankruptcy Court below made the determinations, and reviewed all relevant factors, as required by most courts of appeal.

The application of state foreclosure law, or the reaching of an irrebuttable presumption after an evidentiary determination, are not prohibited by, or in conflict with, bankruptcy purposes or congressional intent.

Congress has tacitly approved of, and has never overruled or disapproved of, the opinion in *Madrid* (9th Cir. BAP), which was a basis for the Ninth Circuit's decision below. Indeed, Congress' intent in light of almost 15 years of decisions, is to leave a determination under 11 U.S.C. § 548(a)(2)(A) to the various courts of appeal, subject to state foreclosure laws.

The Ninth Circuit's decision promoted harmony with complex state laws, encouraged bidding at sales, enhanced potential recoveries by debtors, and promoted an active marketplace for real property which are all essential to a robust economy.

That decision was not erroneous and must be permitted to stand.

For these reasons, and other reasons as may be apparent herein, this Supreme Court should not issue a Writ of Certiorari.

Dated: April 26, 1993

Respectfully submitted,

MICHAEL R. SMENT
Counsel of Record
Attorney for Respondents
Paul Osborne, William Little,
Dennis Roy, Arthur Ritz,
Jose Cruz and Richard Marcz

Supreme Court, U.S.
FILED
MAY 6 1993
OFFICE OF THE CLERK

CASE NO. 92-1370

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO BRIEFS OF RESPONDENTS

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CASE NO. 92-1370

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO BRIEFS OF RESPONDENTS

Petitioner BFP responds to the briefs of Respondents as follows:

To comply with length limitations of Rule 15, the following words are used to mean the following herein:

Osborne: All individual respondents.

Resale: The sale by Osborne.

Foreclosure: Where, appropriate, the sale (transfer) sought to be avoided.

STATEMENT OF THE CASE

Osborne claims that evidence was taken (Br. p. 15). There was no evidentiary hearing. The court dismissed for failure to state a claim upon which relief could be granted (Pet.Cert. App. pp. 28-31).

Osborne refers to the prior involuntary proceeding (Osborne's Br. p. 2) filed December 31, 1988 in which Petitioner was not adjudicated bankrupt and which was dismissed prior to the July 12, 1989 foreclosure sale (Osborne's Br. p. 2-3). Its only relevance is the lack of

notice to Petitioner of proceedings by Imperial; the latter did not send copies of pleadings to the address shown on BFP's pleadings.

Osborne states that the surplus of the bid over the amount owing on the note secured by the first trust deed was made available to the junior trust deed holder. Such does not appear in the record.[1] This contention, made for the first time in the opposition to certiorari, should not be considered.

Although notice required by California law was given, BFP alleged lack of notice of continuances and that Imperial promised notice (Appendix, para. 26 of the Complaint, p.20). These facts strengthen BFP's position under the cases which consider circumstances of the sale

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1. The record does not show what happened to the surplus. Imperial's agents have not properly disbursed or accounted for the funds.

in addition to inadequacy of consideration in determining the applicability of 11 U.S.C. 548(a)(2). A copy of the Complaint is in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

I. THE WRIT IS NOT A DRASTIC REMEDY TO BE AVOIDED

(OSBORNE'S BR. P. 5 TO THE CONTRARY)

Osborne contends that certiorari is a drastic remedy. He cites In re Woods, 143 U.S. 202, 206, 12 S.Ct. 417, 36 L.Ed. 125 (1892) where this Supreme Court declined to grant on certiorari to review a decision on state law and Forsyth v. Hammond, 166 U.S. 506, 513-515, 17 S.Ct. 665, 41 L.Ed. 1095 (1897) on certiorari before final judgment saying, even so, conflict of circuits is a basis (p. 515). Certiorari (28 U.S.C. Section 1254) is a discretionary writ which takes the place of appeals. Conflict of Courts of Appeal

decisions is a ground for granting the writ: Rule 10.1(a), Supreme Court Rules; Dewsnup v. Timm, ___ U.S. ___, 112 S.Ct. 773, 776, 116 L.Ed.2d 903 (1992); Buffalo Forge Co. v. United Steel Workers of America, 428 U.S. 397, 404, 19 L.Ed.2d 1022, 1028, 96 S.Ct. 3141 (1976); as are other grounds mentioned in Rule 10.1(c).

II. THE PETITION IS NOT MOOT

(OSBORNE'S BR. P. 6 TO CONTRARY)

Osborne contends that the resale of the property makes the case moot (p. 7). On July 12, 1989, the foreclosure sale occurred. On November 24, 1989, the adversary complaint (App. hereto) to avoid that foreclosure sale was filed. The resale was on January 31, 1990. Osborne's Motion to Dismiss was heard on February 6, 1990. No evidence of the

resale appears in the record.[2]

Relief other than restoration of the property is available. 11 U.S.C. Section 550(a) provides that property or its value may be recovered; In re Lindsay, 98 B.R. 983, 992-3, (Bkrtcy. S.D. Cal. 1989), In re Coleman, 21 B.R. 832, 836-7 and In re Nance, 26 B.R. 105 (Bkrtcy. S.D. Ohio 1982) so held.

In some of the cases cited by Respondent Osborne, court authorization was needed to enter into a transaction, was

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2. Also not in the record: On November 30, 1989, as Instrument No. 89-651420, a lis pendens of the adversary complaint to avoid the foreclosure sale was duly recorded in the County of Orange. Prior to the filing of the adversary complaint, Petitioner BFP and Respondent Osborne discussed releasing a lis pendens of a state court action and holding the proceeds of sale. BFP suggested that the proposed written agreement refer to the lis pendens of this case. The proposed agreement was not signed. Did a title company miss the lis pendens or did the buyers assume the risk?

given and the transaction took place. The appeal would not undo the acts done pursuant to the court order involving persons not parties. For instance, in Valley Nat. Bank of Ariz. v Trustee, 609 F.2d 1274, 1283 (9th Cir. 1979) the court specifically said that the merger had taken place and

> "...persons who were affected by that transaction are not subject to the jurisdiction of either this court or the reorganization court. ... All of these facts make it difficult, if not impossible, to fashion an equitable remedy. ..."

In this case, as stated above, relief can be granted without affecting the buyers on the resale. Furthermore, petitioner alleged fictitious defendants acquired an interest in the property (pp. 1 and 3 of Appendix hereto).

In re Coleman, cited above, it was held that failure to keep the automatic stay (11 U.S.C. Section 362) in effect did not bar relief. In this case, judgment for the value or sales price less cost to Osborne is the proper remedy.

III. THERE IS A REAL CONFLICT BETWEEN THE CIRCUIT COURT OPINIONS

(OSBORNE BR. P.8)

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980) was decided under the Bankruptcy Act, Section 67(d) which provided that transfers "without fair consideration" are fraudulent and null and void and consideration given is "fair (1) when in good faith, in exchange and as a fair equivalent therefor property is transferred. . . ." In Littleton, 888 F.2d

90, 92 fn.5 (11th Cir. 1989), the court said that said Section 67(d) of the Act was the forerunner of Section 548(a) of the Code and courts have applied the reasoning of Durrett to cases under said Section 548(a).

Osborne contends that Durrett has been characterized as dictum (Osborne Br. p. 8). The Circuit Court said "Upon remand, the District Court shall enter judgment for plaintiff-appellant directing the rescission of the transfer under Section 67(d) of the Act." It is clear holding, not dictum.

The very cases cited by Osborne say that Durrett "held" that a foreclosure sale could be avoided for inadequacy of price. The language regarding dictum was with respect to the innuendo that the 70% rule would govern whether or not the consideration was of reasonably equivalent value. Osborne cites:

A. Federal Deposit Insurance Corp. v. Blanton, 918 F.2d 524, 532, fn. 7 (5th Cir. 1990). The court said of Durrett:

> "...the Fifth Circuit held that ... (a) foreclosure sale... the transfer was fraudulent under Bankruptcy Act 67(d)."

and that courts have applied the reasoning of Durrett (on Bankruptcy Act 67(d)) to cases under said Section 548(a).

B. In re Littleton, 888 F.2d 90, 92, reasonably equivalent value was found because extinction of junior liens benefited the Debtor and the liens exceeded the value of the property so that Debtor had no equity. The court said:

> "in Durrett, the 5th Circuit held that a...foreclosure sale... was fraudulent under Bankruptcy Act Section 67(d)." (Emphasis added)

C. In the Matter of Grissom, 955 F. 1440, 1449 (11th Cir. 1992) the court

referred to "dictum" (p. 1446, in the paragraph beginning on prior page) as to the 70% rule only and said:

> "...The Bankruptcy Court clearly revealed its intention to abide by the 70% dictum of Durrett" (page 1448).

The court said that "Durrett's 70% test should only be used as a guideline (p. 1445) with other factors discussed at pages 1446 and 1448. The court remanded the case for consideration of the factors.

Twice on page 9, Osborne contends that Durrett is no longer the law and/or is not entirely valid, citing the foregoing three cases and Sandoz v. Bennett (In re Emerald Oil Co.), 807 F.2d 1234, 1238, fn. 6, (5th Cir. 1987). In that footnote it said that Durrett is still the law of that circuit. Sandoz said In re Madrid, 725 F.2d 1197 (9th Cir. 1984) criticized

Durrett. However, that Madrid decision was that there was no transfer and it did not discuss lack of reasonably equivalent value. Congress promptly made it doubly clear that a foreclosure is a transfer as held in In re Ehring, 906 F.2d 184 (9th Cir. 990). In Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981) the criticism of Durrett also was only in the dissent.

Respondent Osborne contends that Grissom did not disagree with the decision sought to be reviewed. The 9th Circuit Court holds that there is an irrebuttable presumption that the bid is the reasonably equivalent value. Osborne's quote from p. 1446 of Grissom concerns a rebuttable presumption, and the Grissom court said at page 1447 that:

> "...it is inappropriate to make either the achievement of a fixed percentage of value or compliance

> with the state foreclosure law the decisive factor.

Osborne contends at page 11 that in Barrett v. Commonwealth Savings Ass'n., 939 F.2d 20 (3rd Cir. 1991) the parties had stipulated at the trial that the value would be interpreted pursuant to Matter of Bundles. Not so. There, the court said that on the appeal, the parties agree that the Bundles standard should be used. Barrett specifically discussed factors to be considered in determining whether the reasonably equivalent value was given!

At page 11, Osborne quoted the following part of Barrett not underscored and omitted the portion underscored:

> "[r]elief from foreclosure should be reserved for extraordinary situations where the state law or sheriff's office procedures have not been followed,

where advertising is extremely limited, or . . ."

In making the decision sought herein to be reviewed, the court did not go into any factors which might determine whether or not there was reasonably equivalent value.[3]

On Respondent's Motion to Dismiss, the allegations in the complaint that the property was worth $725,000.00 and that the sale was for less than reasonably equivalent value (Appendix hereto, para. 28, p.20) are to be taken as true; dismissal is proper only if under no theory could plaintiff be entitled to relief, as held in Kelson v. Springfield, 767 F.2d 651, (9th Cir. 1980). This Honorable

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3. Had the case gone to trial, evidence would have shown that the sale was noticed for December 1988, postponed six times to July 12, 1989 without any additional advertising and without giving notice to BFP or the second trust deed holder.

Court stated on a Motion for Judgment on the Pleadings, "allegations are accepted", Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957).

The Bankruptcy Court stated that the controlling decisions were (1) In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982) (which held the consideration received at the foreclosure sale is reasonably equivalent value) and (2) In re Ehring, 91 B.R. 897, (9th Cir. BAP 1988) which held there was no transfer). On appeal of the latter it was held that a foreclosure is a transfer, In re Ehring, 900 F.2d 184 (9th Cir. 1990).

Respondent Osborne states that in the last fifteen years Congress has not amended reasonably equivalent value. In re Madrid, 725 F.2d 1197 (9th Cir. 1984) did not discuss whether the foreclosure establishes the reasonably equivalent value but held that the foreclosure

BEST AVAILABLE COPY

did not constitute a transfer. Congress promptly amended the definition of transfer in 11 U.S.C. Section 101 to include transfer of an equity of redemption and Section 548 to include "involuntary " transfers.

Respondent Osborne contends that amendments to federal statutes are written in view of existing laws, citing Dewsnup v. Timm, ___ U.S. ___, 112 S.Ct. 773, 779, 116 L.Ed.2d 903 (1992) where this court was reluctant to interpret the Bankruptcy Code to effect a major change not the subject of discussion in legislative history. Yet elsewhere Respondent Osborne argues Durrett does not apply because it was decided under the Bankruptcy Act not the Code.

IV. MISCELLANEOUS MATTERS OSBORNE DISCUSSES (OSBORNE'S BR. P. 18-24)

It is argued that Debtor lost no

equity (p.2) because $421,815.75 was owed on the first trust deed and $200,000.00 on the second. However BFP alleged that the value was $725,000.00 (Appendix hereto, para.28, p. 20). Therefore, there was an equity.

Osborne alleges that BFP benefited by extinction of a junior trust deed. Since BFP lost the property, extinguishing a lien absent extinguishment of the debt was no benefit. To the extent that the junior lien was for hard money advanced, Debtor is still liable on it.

The inadequacy of the price alone is of no concern in the state courts. However, 11 U.S.C. Section 548 provides that a transfer can be avoided if Debtor received less than the reasonably equivalent value.

Osborne cites the Winshall Settlor's Trust, 758 F 2d 1136 (6th Cir. 1985). It is the only Circuit Court case which has

agreed with the 9th Circuit. Five circuits are contrary and the decision in Winshall was decided on facts that occurred before the 1984 amendments.

Osborne refers to the dissent in Abramson v. Lakewood Bank & Title Company, 647 F.2d 547, 549 (5th Cir. 1981) which conceded that the court was bound by Durrett although he thought the foreclosure is no transfer (as held by the 9th Circuit Court in Madrid and overruled by Congress in 1984).

Butner v. United States, 440 U.S. 48, 59 L.Ed.2d 136, 99 S.Ct. 914 is inapplicable. In Butner the Court of Appeals had decided that under state law, the mortgagor was entitled to the rents. This court granted certiorari to determine whether or not a federal equitable principle or the state law governed. At 440 U. S. at 54-55, this court said that property interests are created and de-

fined by state law unless Congress exercised its power to fashion a contrary rule.

By contrast, in Section 548(a)(2), Congress states that a transfer for less than a reasonably equivalent value can be avoided.

V. CONCLUSION

Counsel for BFP asked the clerk if additional time in which to analyze and comment on cases cited by Respondent Osborne could be granted and was told not possible; we reply only to the more important new matters and errors.

Notwithstanding inaccuracies in Respondent Osborne's brief which may justify sanctions, past performance shows that, if certiorari is granted, helpful and competent briefs will be before the court from him and the Solicitor General.

Petitioner asks that the Writ be

granted to resolve conflicts between circuits on whether or not a mortgage foreclosure can be set aside under 11 U.S.C. Section 548, to settle that important question of law and to correct the conflict on statutory interpretation with this courts' decisions.

BFP did not brief the merits fully and so requests that the court not make a summary determination under Rule 16 adverse to BFP.

Dated: May 6, 1993.

RESPECTFULLY SUBMITTED,

ROY B. WOOLSEY
Attorney for Petitioner

D113:BFPSC.P90

APPENDIX

COPY OF COMPLAINT TO BE REVIEWED
FILED NOV 24 P 1:34
0063819
PAID
SUMMONS ISSUED: 27 NOV 1989
ANSWER: 27 DEC 1989
STATUS CONFERENCE
DATE: 2 FEB 1990 AT 11:00 A.M.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: BFP, a Partnership, Debtor.	No. SA 89-06771-JR Chapter 11 Adv.No. SA-89-0977-JR
BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY, and DOES 1 to 10, inclusive, Defendants.	COMPLAINT TO DECLARE TRANSFER OF REAL PROPERTY NULL AND VOID, AND TO VACATE AND SET ASIDE TRUSTEE'S DEED OF TRUST, AND FOR DAMAGES

Plaintiff alleges that:

1. This adversary proceeding is brought pursuant to Section 548(a)(2)(A) and (B)(i) and the jurisdiction of this Court is based upon 28 U.S.C. 1334(b) and Title 11, United States Code. This is a "core" proceeding under 28 U.S.C. 157(b)(2)(F).

2. At all times herein from August 27, 1987 to the end of 1987, BFP was a partnership composed of WAYNE L. PEDERSEN, MARLENE PEDERSEN, who is also known as MARLENE M. PEDERSEN, and RUSSELL J. BARTON; WAYNE PEDERSEN and MARLENE PEDERSEN assigned their interest to OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC. Subject to the effect of that assignment, it is a co-partnership.

3. At all times since September 29, 1987, defendant IMPERIAL SAVINGS & LOAN ASSOCIATION has been and now is a corporation organized and existing under

the laws of the state of California.

4. Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ, RICHARD MARCY, and DOES 1 to 10, purchased the real property described on Exhibit A at a Trustee's Sale and Does 1 to 10 are successors in interest of some interest therein.

5. The true names and capacities, whether individual, corporate, associate, or otherwise of defendants named herein as Does 1 through 10, inclusive, are unknown by plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff will ask leave of court to amend this Complaint to show the true names and capacities of such defendants when the same have been ascertained.

6. At all times prior to July 29, 1989, SHELDON L. FOREMAN and ANN FANT FOREMAN and plaintiff BFP have been and were in open, notorious, conspicuous and

exclusive possession of said real property and defendants, and each of them, had notice of the rights and claims of said BFP, SHELDON L. FOREMAN and ANN FANT FOREMAN.

7. At all times herein mentioned prior to the recording on August 25, 1987, of the deed hereinafter referred to, executed by SHELDON L. FOREMAN and ANN FANT FOREMAN, they owned the real property in the City of Newport Beach, County of Orange, described on Exhibit "A", attached hereto and hereby incorporated herein.

8. On or about July 10, 1987, RUSSELL J. BARTON and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, orally agreed and agreed in writing that WAYNE L. PEDERSEN be the buyer of said real property, that said WAYNE L. PEDERSEN given an option to said plaintiff to purchase said real property during the

period of One Hundred Eighty (180) days from the date of recordation of the deed describing said real property, for a sum equal to indebtedness secured by said real property consented to by RUSSELL J. BARTON, that defendants not convey or encumber said real property otherwise during said option period without consent of plaintiff RUSSELL J. BARTON that if RUSSELL J. BARTON exercise said option he would pay 25% of profits to said WAYNE L. PEDERSEN.

9. On or about August 3, 1987, SHELDON L. FOREMAN and ANN FANT FOREMAN, and WAYNE L. PEDERSEN made, executed and delivered escrow instructions in and by which they named Cress Escrow Corporation in Irvine, California, as escrow holder, and agreed to the sale of said real property by said plaintiff and purchase of it by said WAYNE L. PEDERSEN. WAYNE L. PEDERSEN promised, represented, war-

ranted and agreed to deliver to plaintiff, Three Hundred Fifty-six Thousand Two Hundred Fifty ($356,250.00) Dollars being the proceeds of a loan to be secured by a first trust deed describing said property securing a note for approximately Three Hundred Fifty-six Thousand Two Hundred Fifty ($356,250.00) Dollars and certain rare coins to be delivered.

10. Thereafter, the parties to said escrow amended the escrow instructions to provide that said MARLENE PEDERSEN be a party a a buyer.

11. During August of 1987, newspapers stated that WAYNE L. PEDERSEN was under investigation for alleged fraudulent sales of rare coins and SHELDON L. FOREMAN and ANN FANT FOREMAN voiced to WAYNE L. PEDERSEN concerns regarding the same; the parties to the escrow orally agreed that in place of the rare coins, a partnership be formed, that WAYNE L.

PEDERSEN and MARLENE M. PEDERSEN deed to it and make, execute and deliver a note and a trust deed describing said real property and SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries to secure said note that said note be payable to SHELDON L. FOREMAN and ANN FANT FOREMAN in the sum of Two Hundred Thousand Dollars ($200,000.00), and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN promised, represented, warranted and agreed that they would deliver such note and trust deed, that the escrow close, and that plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN may remain in possession of said real property under delivery of said Two Hundred Thousand Dollars ($200,000.00) note and trust deed in good and sufficient form and recording thereof and until RUSSELL J. BARTON was ready to commence remodeling; later, in August, the parties orally agreed that WAYNE L.

PEDERSEN and MARLENE M. PEDERSEN deed to BFP and that BFP execute the trust deed naming SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries.

12. Pursuant to said oral agreement, the following occurred and documents which were recorded in the official records of Orange County:

a. A deed dated August 12, 1987, describing SHELDON L. FOREMAN and ANN FANT FOREMAN as grantors, WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantees, and describing said real property. Said deed was recorded on August 25, 1987, as Instrument No. 87-481934.

b. A deed of trust describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as trustors, L. C. Service Corporation trustee, Loan Marketing and Brokers' Services, Inc., beneficiary, and describing said real

property, securing a note for Three Hundred Fifty-six Thousand Two Hundred Fifty Dollars ($356,250.00) and interest at 12% per annum, principal and interest payable Three Thousand Six Hundred Sixty-four and 44/100 Dollars ($3,664.44) on the first day of each month beginning October 1, 1987. Said trust deed was recorded on August 25, 1987, as Instrument No. 87-481935. Said trust deed was assigned by said Loan Marketing and Brokers' Services, Inc. to Abbey Mortgage Corporation by assignment recorded August 2, 1987, as Instrument No. 87-841936, and by it to Imperial Savings Association by assignment recorded August 25, 1987, as Instrument No. 87-841937.

c. On or about August 16, 1987, RUSSELL J. BARTON and WAYNE L.

PEDERSEN and MARLENE PEDERSEN made, entered into and delivered a partnership agreement dated August 26, 1987, whereby BFP, a partnership, was formed.

d. A deed dated August 27, 1987, describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, as grantors, plaintiff BFP, a general partnership, as the grantee, and said real property [sic. "and" omitted] was recorded on September 16, 1987, as Instrument No. 87-514675. On September 11, 1986, RANDY JONES, being duly sworn, said to Patrick Wruck, notary, that he saw said grantors execute and deliver said deed.

e. On August 27, 1987, plaintiff BFP made, executed and delivered a deed of trust naming SHELDON L. FOREMAN and ANN FANT FOREMAN as

beneficiaries and describing said real property securing a note for Two Hundred Thousand Dollars ($200,000.00). Deed of trust was duly recorded on September 16, 1987, as Instrument No. 87-514676. A copy of said deed of trust is marked Exhibit A and attached hereto. In and by said trust deed, it was agreed that in the event of a lawsuit between the parties, the prevailing party would be entitled to reasonable attorney's fees. Said note provided that interest at 10% per annum be paid monthly beginning on September 27, 1987, and principal be due on or before February 27, 1988.

13. Plaintiff performed all of the covenants and obligations to be performed by them in said agreements, including said purchase agreement, said partnership

agreement, and the escrow instructions as amended.

14. On or about September 29, 1987, without the consent, permission or approval and without prior knowledge of plaintiff or RUSSELL J. BARTON, WAYNE L. PEDERSEN and MARLENE M. PEDERSEN made, executed and delivered a deed whereby they purported to convey said property to OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., a California corporation. A copy of said deed is attached hereto as Exhibit B, but is not incorporated herein by reference. At the time of the making and acceptance of said deed, the grantee knew and should have known of plaintiff's possession of and claims to said real property.

15. No payments have been made on either of the notes secured by trust deeds on said real property except the payment by SHELDON L. FOREMAN n the note

secured by the first trust deed in order to reinstate it during 1988.

16. In 1988, after SHELDON L. FOREMAN had reinstated the note secured by the first trust deed and while plaintiff BFP and SHELDON L. FOREMAN litigated their claims against OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., defendant IMPERIAL SAVINGS & LOAN ASSOCIATION caused to be given a notice of default under the first deed of trust and thereafter noticed a sale to take place in December of 1988. The notice of sale stated that the sale would be for cash and designated no equivalents allowed by Section 2924(b) of the California Civil Code. A copy of the notice is marked as Exhibit C and incorporated herein.

17. In December of 1988, OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., filed an involuntary Petition Under Chapter 11 of the U. S. Bank-

ruptcy Code alleging that BFP, a Partnership, was insolvent. Said petition was filed in the U. S. Bankruptcy Court for the Central District of California sitting in Santa Ana No. SA-88-07521-JR.

18. In said petition, it was alleged that BFP's address was 3303 F-1 Harbor Blvd., Costa Mesa, California. In 1987, that had been the address of BFP, however, at no time after 1987 was 3303 F-1 Harbor Boulevard, the address of BFP. BFP, a Partnership, filed a response to said petition and showed in the upper left hand corner of the first page that it was filed in pro per and that its address was 3051 Yukon Circle, Costa Mesa, CA 92626.

19. At a hearing in connection with the petition for adjudication under Chapter 11 held on or about May 11, 1989, counsel for IMPERIAL SAVINGS & LOAN ASSOCIATION appeared at the hearing and

knew at that time in that hearing that BFP was present by its general partner, RUSSELL BARTON, and by a claimed partner, OFF-ROAD VEHICLES, by its president, GARY HENIG, AND ITS COUNSEL, Armando Lopez, and BFP and RUSSELL BARTON were present by their counsel, Roy B. Woolsey.

20. At said time and place, plaintiff BFP and SHELDON L. FOREMAN and ANN FANT FOREMAN requested that the sale on foreclosure be continued until after July 17, 1989, the date on which the quiet title action in the state court determining title to said real property was set for trial. Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION stated that it would not conduct the sale until it got a copy of the order, meaning a copy of the order of the Bankruptcy Court on the pending petition for adjudication under Chapter 11.

21. On or about May 18, 1989,

knew at that time in that hearing that BFP was present by its general partner, RUSSELL BARTON, and by a claimed partner, OFF-ROAD VEHICLES, by its president, GARY HENIG, AND ITS COUNSEL, Armando Lopez, and BFP and RUSSELL BARTON were present by their counsel, Roy B. Woolsey.

20. At said time and place, plaintiff BFP and SHELDON L. FOREMAN and ANN FANT FOREMAN requested that the sale on foreclosure be continued until after July 17, 1989, the date on which the quiet title action in the state court determining title to said real property was set for trial. Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION stated that it would not conduct the sale until it got a copy of the order, meaning a copy of the order of the Bankruptcy Court on the pending petition for adjudication under Chapter 11.

21. On or about May 18, 1989,

defendant IMPERIAL SAVINGS & LOAN ASSOCIATION filed in said matter a Motion for an Order Granting Relief form the Automatic Stay and, thereafter, on May 22, 1989, caused to be executed an affidavit of service stating that the services of a copy of the notice of motion, together with a motion and declaration was served on BFP, a Partnership, by mailing to 3303 F-1 Harbor Blvd., Costa Mesa, California.

22. BFP had not been at 3303 F-1 Harbor Boulevard, Costa Mesa, California for over a year and all of the parties hereto knew that it was the policy of the United States post office not to forward mail for more than one year from the time of a change of address.

23. No copy of said notice of motion, motion or declaration was ever received by BFP, and plaintiff is informed and believes and, based upon said

information and belief allege, that the envelope containing the notice of hearing, motion, and declaration was returned to the office of counsel for defendant, Imperial Savings Association, and that Imperial Savings Association knew that defendant did not know that said motion had been filed and concealed those facts from plaintiff.

24. Said notice stated that there would be a hearing on said motion on June 12, 1989. Thereafter, the Bankruptcy Court, not realizing that BFP had not been served, made an order granting said motion. Notwithstanding that BFP had not appeared at said hearing and had no knowledge thereof, IMPERIAL SAVINGS & LOAN ASSOCIATION forwarded a Judgment and Order Vacating the Automatic Stay to the Bankruptcy Court together with an affidavit that BFP was served by mailing to 3033 F-1 Harbor Blvd., Costa Mesa, Cali-

fornia. Said copies allegedly so served were never received by plaintiffs, SHELDON L. FOREMAN or ANN FANT FOREMAN. Plaintiffs are informed and believe, and, based upon such information and belief allege, that the post office returned the same to counsel for IMPERIAL SAVINGS and that IMPERIAL SAVINGS knew that said order was entirely without notice to or knowledge of SHELDON L.FOREMAN, ANN FANT FOREMAN and plaintiff.

25. In 1988, SHELDON L. FOREMAN paid $32,000.00 to IMPERIAL SAVINGS to reinstate the trust deed and note and from time to time discussed the pendency of the foreclosure sale with him and had told him that he would reinstate but not until the last minute hoping that the matter of title had been determined between him and Off-Road Vehicles.

26. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff are informed and

believe and, based thereon allege, that in May of 1989, defendant IMPERIAL SAVINGS informed an agent of SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff that said defendant would give notice of the foreclosure sale if it was to occur, and it did not do so. The beneficiaries under the deed of trust misled SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff to believe that there would be no foreclosure sale until after what was determined in the Superior Court trial then set for July 17, 1989, and SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff believed there would be no sale until after July 17, 1989. The trustee under the deed of trust promised a notice of continuance of the sale but did not provide the same and, by reason thereof, the sale was invalid.

27. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff had heard from said

agent and reasonably understood and believed that the sale would not take place until after the trial in the quiet title action then scheduled for July 17, 1989.

28. Without any notice to SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiffs, said sale was conducted on or bout July 12, 1989. Said property was then worth over $725,000.00. Defendants, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCY, who were the purchasers at the sale, bid $433,000.00 for said property.

29. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff was informed and believe and, based upon such information and belief allege, that said $433,000.00 was not paid on the date of the sale in cash or any equivalent of cash but that the same was paid later. At no time did SHELDON L. FOREMAN, ANN FANT FOREMAN and

plaintiff consent to any sale and at no time did they consent to any sale other than for cash.

30. Prior to the commencement of the above entitled matter and after said sale, SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff offered to pay said defendants the sum of $433,000.00 together with an additional $25,000.00 for the property. Defendants refused to accept said offer and refused to convey said property.

31. Within the year last past, to wit, on or about July 12, 1989, a foreclosure sale was conducted at [sic. meaning "of"] said property. Under and pursuant to said trust deed wherein and whereby plaintiff involuntarily paid [sic. meaning "made"] a transfer for which it received less than the reasonably equivalent value in exchange for such transfer, and was insolvent on the date

that such transfer was made, or became insolvent as a result of such transfer or obligation.

32. SHELDON L. FOREMAN and ANN FANT FOREMAN stand ready to redeem the property from the sale and subject it to the interests of BFP as an owner subject to the FOREMAN's deed of trust.

WHEREFORE, plaintiff respectfully prays that this Court declare the transfer of assets to defendants null and void, vacate and set aside the trustee's deed of trust given with respect thereto, and award plaintiff costs of action and such other and further relief as the Court may deem just.

Dated November 24, 1989.

ROY B. WOOLSEY, INC., and
WOOLSEY, ANGELO & THATCHER

By: ROY B. WOOLSEY
Attorneys for Plaintiff

RBW:lb
D85:FOREBFP.P26

D113:BFPSC.P91

reinstate the trust deed and note and from time to time discussed the pendency of the foreclosure sale with him and had told him that he would reinstate but not until the last minute hoping that the matter of title had been determined between him and Off-Road Vehicles.

26. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff are informed and believe and, based thereon allege, that in May of 1989, defendant IMPERIAL SAVINGS informed an agent of SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff that said defendant would give notice of the foreclosure sale if it was to occur, and it did not do so. The beneficiaries under the deed of trust misled SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff to believe that there would be no foreclosure sale until after what was determined in the Superior Court trial then set for July 17, 1989, and SHELDON L.

FOREMAN, ANN FANT FOREMAN and plaintiff believed there would be no sale until after July 17, 1989. The trustee under the deed of trust promised a notice of continuance of the sale but did not provide the same and, by reason thereof, the sale was invalid.

27. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff had heard from said agent and reasonably understood and believed that the sale would not take place until after the trial in the quiet title action then scheduled for July 17, 1989.

28. Without any notice to SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiffs, said sale was conducted on or bout July 12, 1989. Said property was then worth over $725,000.00. Defendants, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCY, who were the purchasers at the sale, bid

$433,000.00 for said property.

29. SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff was informed and believe and, based upon such information and belief allege, that said $433,000.00 was not paid on the date of the sale in cash or any equivalent of cash but that the same was paid later. At no time did SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff consent to any sale and at no time did they consent to any sale other than for cash.

30. Prior to the commencement of the above entitled matter and after said sale, SHELDON L. FOREMAN, ANN FANT FOREMAN and plaintiff offered to pay said defendants the sum of $433,000.00 together with an additional $25,000.00 for the property. Defendants refused to accept said offer and refused to convey said property.

31. Within the year last past, to

wit, on or about July 12, 1989, a foreclosure sale was conducted at [sic. meaning "of"] said property. Under and pursuant to said trust deed wherein and whereby plaintiff involuntarily paid [sic. meaning "made"] a transfer for which it received less than the reasonably equivalent value in exchange for such transfer, and was insolvent on the date that such transfer was made, or became insolvent as a result of such transfer or obligation.

32. SHELDON L. FOREMAN and ANN FANT FOREMAN stand ready to redeem the property from the sale and subject it to the interests of BFP as an owner subject to the FOREMAN's deed of trust.

WHEREFORE, plaintiff respectfully prays that this Court declare the transfer of assets to defendants null and void, vacate and set aside the trustee's deed of trust given with respect thereto,

and award plaintiff costs of action and such other and further relief as the Court may deem just.

Dated November 24, 1989.

ROY B. WOOLSEY, INC., and
WOOLSEY, ANGELO & THATCHER
Attorneys for Plaintiff

[Exhibits not attached to Complaint:

Exhibit A: Trust Deed, BFP to Foreman referred on on pages 42, 43 and 50,

Exhibit B: Deed from Pedersens to Off-Road, referred to on page 51,

Exhibit C: Notice of Sale, referred to on page 53,

are attached to Respondent's Motion as Exhibits A, B & C to Exhibit 2 to Exhibit A (this Joint Appendix pages 164-174); see also, petitioner's Memorandum of P's and A's, DN 5)]

FILED JAN 2 1990

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Bk. No. SA89-06771-JR
BFP, a Partnership,	CHAPTER 11
BFP, a Partnership, Plaintiff vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ, RICHARD MARCY; and DOES 1	Adv. No. SA89-0977-JR NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MICHAEL R. SMENT [Fed. Bk. Rule 7012 (b); Rule 12(b)(6); F.R.C.P.]

* * *

Defendants.

* * *

TO: DEBTOR, ITS ATTORNEY AND ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that on February 6, 1990, at 11:00 a.m., or as soon thereafter as the matter may be heard or

as soon as the matter may be heard as specified by the Court, before the Honorable John Ryan, United States Bankruptcy Judge, presiding, in Courtroom 510 of the United States Bankruptcy Court located at 34 Civic Center Plaza, Santa Ana, California, Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ (erroneously sued herein as JOSE CRUZ), and RICHARD MARCZ (erroneously sued herein as RICHARD MARCY) (collectively "these Defendants" herein) will move and request this Court to dismiss the Complaint To Declare Transfer of Real Property Null And Void, etc., of Debtor/Plaintiff BFP, a partnership ("Debtor") pursuant to Federal Bankruptcy Rule 7012(b) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This Motion will be made on the ground that the Complaint fails to state a claim against these Defendants upon

which relief can be granted. The Motion will be based upon this Notice, the attached Memorandum of Points and Authorities, the attached Declaration of Michael R. Sment, the pleadings and records on file in connection with this Bankruptcy case and these Defendants' Motion for Relief From Automatic Stay, etc., filed herein, on certain matters of which this Court is requested to take judicial notice, and on such other matters, testimony and argument as are presented at any hearing with respect hereto.

DATED: December 28, 1989

Respectfully submitted,

/s/ Michael R. Sment

Attorneys for Defendants

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

On or about December 31, 1988, an involuntary Chapter 11 petition was filed against Debtor in this Court (Bk. No. SA88-07521-JR). Defendant IMPERIAL SAVINGS ASSOCIATION (erroneously sued herein as IMPERIAL SAVINGS & LOAN ASSOCIATION) ("Imperial") the beneficiary of the first trust deed encumbering the subject property[1] obtained a Judgment and

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1. Suspiciously, Debtor's Complaint does not describe the real property which is the subject of it. Paragraph 7 of the Complaint refers to an Exhibit "A", but this Exhibit was not attached to the copy of the Complaint served on these Defendants. In fact, the Complaint served on these Defendants had no exhibits attached to it whatsoever. These Defendants are informed and believe, and based thereon allege, that the real property which is the subject matter of the Complaint is generally described as 225 Via Genoa, Lido Isle, Newport Beach, California ("subject property" herein). The subject property is legally described in Exhibit "1" which was attached to these Defendants' Motion for Relief From Automatic Stay (Ref. No. M9-0419-JR) filed herein November 8, 1989. A true and correct copy of the Motion for Relief

Order Vacating Automatic Stay in that case which was entered by this Court on June 15, 1989. Pursuant to that Judgment, Imperial obtained relief from the Automatic Stay in the prior Chapter 11 case to proceed with foreclosure and hold a trustee's sale of the subject property.

Pursuant to an Order requested by Debtor and entered herein on June 14, 1989, the prior involuntary Chapter 11 case was dismissed. On July 12, 1989 -- over 3-1/2 months prior to the filing of this bankruptcy case -- and pursuant to the aforementioned Judgment and dismissal order, the subject property was sold at a

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...Continued...

(with exhibits tabbed as on the original) is attached hereto as Exhibit "B" and incorporated herein by this reference. Suspiciously, Debtor's Complaint was not served on any attorney for these Defendants despite the clear knowledge of Debtor and its attorneys that Rich & Ezer has been representing these Defendants in this bankruptcy case and in several Orange County Superior Court actions(s).

properly scheduled trustee's sale, conducted on behalf of Imperial, to these Defendants for the sum of $433,600.00. A Trustee's Deed Upon Sale was issued on July 18, 1989 and recorded on July 21, 1989, as Instrument No. 89-3850 with the Official Records of Orange County. A true and correct copy of that trust deed is attached to these Defendant's Motion for Relief as Exhibit "6" and is incorporated herein by reference. Pursuant to California law, title to the subject property became vested in Movants upon the delivery and execution of that trustee's deed.

On or about July 14, 1989, Debtor and others filed an action in the Superior Court for the County of Los Angeles (Case No. 596890) in which they attempted to attack the validity of the trustee's sale. After discussions with Defendant Dennis Roy: that previous action was

dismissed, a lis pendens recorded in connection therewith was withdrawn, and the occupant of the subject property (Sheldon Foreman, a member of Debtor) voluntarily vacated it and surrendered it to these Defendants. A true and correct copy of a Declaration by Dennis Roy (filed in support of these Defendants' Superior Court Motion to Expunge) in this regard is attached to these Defendants' Motion for Relief Exhibit "7" and is incorporated herein by reference.

Thereafter, on August 18, 1989, Debtor and others commenced yet another action in the Superior Court for the County of Orange (Case No. 600205) against these Defendants and Imperial to quiet title, for declaratory relief, to impress a trust and for damages. A true and correct copy of the Superior Court Summons and Complaint in connection therewith is attached collectively Exhib-

it "2" to these Defendants' Motion for Relief and is incorporated herein by reference. In connection with that Superior Court action, Debtor and others also recorded a Notice of Pending Action (lis pendens) against the subject property.

On or about October 12, 1989, these Defendants filed a Demurrer to Debtor's Superior Court Complaint along with a Motion for Order Expunging the Lis Pendens, with a Superior Court hearing scheduled thereon for October 17, 1989 at 9:00 a.m. True and correct copies of the Demurrer and Motion to Expunge (with exhibits) are attached to Exhibits "3" and "4", respectively, these Defendants' Motion for Relief and are incorporated herein by reference. On October 25, 1989 -- less than two days before that scheduled hearing, and apparently to avoid an undesirable outcome in the Superior Court

action -- Debtor commended the instant bankruptcy case. The hearing was then continued by the Superior Court to November 14, 1989.

On November 3, 1989, these Defendants filed their Motion for Relief From Automatic Stay herein (Ref. No. M9-0419-JR), along with an application to shorten time for the hearing thereon (so that it could be heard prior to scheduled Superior Court hearing). That application was denied, and these Defendant's Motion for Relief came on for hearing on November 28, 1989 at 9:00 a.m. in this Court. Debtor had filed opposition in Response to the Motion for Relief. On December 145, 1989, this Court entered its Judgment and Order Vacating Automatic Stay, which vacated the Automatic Stay herein for all purposes as to these Defendants, effective November 28, 1989. A true and correct copy of that Judgment is attached

hereto as Exhibit "A" ad incorporated herein by reference. That Judgment has not been appealed from or challenged in any manner, and it became final December 24, 1989.

Movants are informed and believe, and based thereon allege, that on November 27, 1989 (the day before the hearing on these Defendants' Motion for Relief), Debtor filed this adversary Complaint. It also recorded another lis pendens against the subject property. Debtor's representative (Mr. Foreman) did not inform this Court or counsel of that filing when he appeared at the hearing.

On or about December 13, 1989 -- the day before the new hearing scheduled in the Orange County Superior Court on these Defendants' Demurrer and Motion to Expunge -- Debtor dismissed the Orange County Superior Court action against these Defendants but not against Imperi-

al. These Defendants are informed and believe, and based thereon allege, that said dismissal was intended to avoid an adverse determination against Debtor in the Superior Court, and when combined with the filing of this adversary complaint and the recording of a list pendens in connection therewith, to further confuse and cloud the title with respect to the subject property.

Debtor's Complaint clearly sets forth no claim for relief or cause of action against these Defendants. These Defendants were innocent, good-faith and third-party purchasers, was merely a successful bid at a trustee's sale held by Imperial. That was conducted pursuant to a Judgment vacating the stay in, and order dismissing, the prior Chapter 11 case involving Debtor. That trustee's sale occurred over 3-1/2months prior to the filing of the bankruptcy case herein.

Under Federal bankruptcy law, Debtor cannot set aside the trustee's sale with respect to these Defendants. Under California law, Debtor also cannot set aside the trustee's sale with respect to these Defendants. Accordingly, Debtor's Complaint against these Defendants must be dismissed with prejudice.

II.

DEBTOR'S COMPLAINT MUST BE DISMISSED AS IT FAILS TO STATE A CLAIM AGAINST THESE DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED

In lieu of an answer, Federal Bankruptcy Rule 7012(a) specifically authorizes these Defendants to file a motion to dismiss for failure to state a claim. Federal Bankruptcy Rule 7012(b) also specifically incorporates the provisions of Rule 12(b) of the Federal Rules of Civil Procedure into bankruptcy adversary proceedings.

Rule 12(b)(6) F.R.C.P. specifically requires that the failure to state a claim upon which relief can be granted must addressed by a motion. It further provides that such a motion "shall be made before pleading if a further pleading is permitted." (illegible) In re Longhorn Securities Litigation (W.D. Okla. 1983) 573 F.Supp. 278, 279-80.) The Court should dismiss a complaint if it appears beyond a doubt that the plaintiff cannot prove any set of facts upon which to support a claim for relief against the moving defendants. (Conley v. Gibson 1957) 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102; In Re Cole Associates (Bk. Utah 1980) 7 B.R. 154, 156.) In Jackson v. Nelson (9th Cir. 1968) 451 FF.2d 872, 873-74, the Ninth Circuit Court of Appeals upheld the dismissal of a complaint which contained only a series of broad conclusionary statements and

concluded that the complaint failed to state a cause of action against the defendants. The Court of Appeal noted that there would be "no way of determining which defendant, if any, is being charged with responsibility for a particular grievance." (See also Sutton v. Eastern Viavi Co. (7th Cir. 1948) 138 F.2d 959, 960 -- a complaint must be dismissed for failure to state a claim if it fails to link the particular named parties to the wrong-alleged.)

While Debtor's 12-page Complaint refers to a number of alleged wrongs and problems, none of those wrongs are alleged to have been committed by these Defendant, nor is it alleged that these Defendants had any knowledge of those alleged wrongs. The Complaint is suspiciously similar and almost identical to the Complaint filed in the Superior Court action (Case No. 600205) and which is

attached as Exhibit "2" to these Defendants' Motion for Relief. In fact, of the 12 paragraphs contained in the Complaint, only paragraphs 4, 28 and 30 refer at all to these Defendants. In fact, those paragraphs merely set forth the factual occurrences with respect to these Defendants' purchase of the subject property at the trustee's sale and their subsequent refusal to accept an offer from Mr. and Mrs. Foreman. No specific improper, wrongful or illegal act is alleged to have been committed by any of these Defendants, except for their purchase of the subject property as third-party bidders.

III.

ACCORDING TO FEDERAL BANKRUPTCY LAW, DEBTOR CANNOT SET ASIDE THE INVOLVED TRUSTEE'S SALE TO THESE DEFENDANTS

Debtor's Complaint specifically states that: "this adversary proceeding

is brought pursuant to Section 548(a)(2)(A) and (b)(i) . . . under Title 11, United States Code." No other statutory basis is set forth for setting aside the involved trustee's sale or for assessing damages against these Defendants and these Defendants are informed and believe, and based thereon allege, that no other statutory sections would be applicable or available to Debtor.

According to a recent decision of the United States Appellate Panel of the Ninth Circuit, which is binding on this Court, 11 U.S.C. Section 547 and 548 cannot bee used to set aside a pre-petition trustee's sale based on facts as set forth here. In re Ehring, (9th Cir. BAP 1988) 91 B.R. 897, 899-900, the Bankruptcy Appellate Panel considered whether section 548 could be used to set aside a pre-petition trustee's sale. The Bankruptcy Appellate Panel concluded that

that code section prevailed. It specifically noted that:

"The Ninth Circuit has held that for purposes of Section 548, a transfer of real property occurs at the time the creditor's security interest is perfected, as opposed to the time of the subsequent foreclosure sale. In Re Madrid, 725 F.2d 1197, 1200-01 (9th Cir. 1984). Thus, where the perfection occurs more than one year prior to the date of bankruptcy, the transfer is not avoidable as a fraudulent conveyance under Section 548. 725 F.2d at 1201. The Court rejected an earlier contrary decision by the Fifth Circuit which ruled that the transfer occurs at the time of the foreclosure sale. See Durrett v. Washington Nat. Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980)."

* * *

"We find the interpretation of when a transfer occurs in Madrid to be applicable to the present case. Although Madrid involves Section 548, the Code provisions regarding fraudulent transfers, and while this appeal involves allegedly voidable preferences under Section 547, both sections define the time of transfer in relation to when the transaction is perfected under state law against the interests of a bonafide purchaser. In addition, the Madrid court specifically stated that its holding was consistent with the treatment of similar transfers under Section 547. 725 F.2d at 1201 n.2. The Panel is not free to disregard such a clear statement from the Ninth Circuit on this issue. See Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir.

1987); Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981). . . . In California, perfection of a deed of trust occurs upon the recordation of the document with the county recorder."

Debtor's Complaint (p. 5, section 12(b)), specifically states that the first deed of trust in favor of Imperial was recorded on August 25, 1987, as Instrument No. 87-481935 and that the assignment to Imperial was recorded on August 25, 1987 as Instrument No. 87-841937. Thus, Debtor's Complaint admits that the July 12, 1989 trustee's sale occurred almost two years after the trust deed was recorded and over 27 months prior to the commencement of this adversary action. According to Ehring, the recording of the deed of trust was the date when the transfer was perfected herein. (91 B.R. at 900).

11 U.S.C. section 548(a) clearly states that a trustee (or debtor) may only avoid a transfer "that was made or incurred on or within one year before the date of filing of the petition". As the transfer (recording of the first trust deed) occurred on August 25, 1987, and Debtor's bankruptcy petition was not filed until October 25, 1989 -- over two years later -- section 548(a) does not provide any authority for the setting aside of the involved trustee's sale.

In fact, when this bankruptcy case was initially filed, these Defendants; counsel spoke with Debtor's counsel regarding Debtor's prospective adversary complaint. These Defendants' counsel clearly explained to Debtor's counsel that section 548 could not be a basis to set aside the trustee's sale, and specifically referred Debtor's counsel to the Madrid and Ehring decisions.

Although questions have arisen in the past as to the validity of the Madrid decision (in light of the 1984 Amendment to the Bankruptcy Code), the Bankruptcy Appellate Panel in Ehring determined that the Madrid decision is still good law in the Ninth Circuit and binding upon all lower courts. The Bankruptcy Appellate Panel specifically stated that:

> "Some courts have found that the changes [by the 1984 Amendments] overruled Madrid and ratify the Durrett approach. (Citations omitted). . . . However, we agree with those courts which have found that Madrid is still valid law. See In re Winshall Settlor's Trust, 758 F.2d 1136, 1138-39 n.3 (6th Cir. 1985); Lower Downtown Assocs. v. Brazosbank Sav. Ass., 51 B.R. 662, 665 (Colo. 1985). On its face, the amendment to Section 101(50) does

not clearly express an intent to overrule Madrid. . . . However, we note that the Madrid court relied on Section 548(a) itself for its holding that the 'transfer' in question occurs when the lien is perfected rather than when the foreclosure sale takes place. (Citations omitted) In Madrid, the Ninth Circuit noted that their holding was in accord with cases decided under Section 547 (illegible) B.R. at 901) (Emphasis added.)

The Bankruptcy Appellate Panel in Ehring also considered whether or not the Durrett approach (where a debtor claims that the property was sold at the foreclosure sale for less than its fair market value) not applicable to the Ninth Circuit. It note that:

"Even assuming this argument [challenging the adequacy of the

foreclosure price] was property raised before this Panel, we find no windfall where the property is sold at the lien value in a non-collusive regularly held foreclosure sale. See In re Verna, supra, 68 B.R. at 252; Golden v. Tomiyasu, 387 P. 2d 939, 995 (Nev. 1963). Western [the foreclosing beneficiary] should not be penalized for subsequently using the purchased property to its benefit and the resale of the property at its fair market value violates no Code purposes." (91 B.R. at 901.)

IV.

ACCORDING TO FEDERAL BANKRUPTCY LAW AND CALIFORNIA LAW, THE INVOLVED TRUSTEE'S SALE WAS PROPERTY HELD

Debtor's Complaint challenges the involved trustee's sale on two grounds. First, that Imperial's Motion for an

Order Granting Relief From the Automatic Stay was not property served on Debtor (Sections 18, 21, 23 and 24). Second, that Imperial promised to give notice of any trustee's sale (Sections 26, 27 and 28). Both of these allegations, however, are not well-supported by either the law or the facts. Debtor's allegations regarding Imperial's Motion For Relief make no sense. Debtor essentially argues that it was improperly served with the Motion. Debtor's Complaint, however, admits that if the bankruptcy petition listed Debtor's address Harbor Blvd. (p. 7, L. 27-28), and that Imperial served it at the address of record (pp.8-9, l. 21-1). In addition, Defendants are informed and believe, and based thereon allege, that Debtor, its attorneys or its representatives did in fact appear at the hearing on the Motion for Relief. In any event, Debtor has failed to appeal the

Judgment and Order Vacating Automatic Stay entered by this Court on June 15, 1989 with respect to Imperial's Motion, and it can no longer challenge that Judgment by this collateral attack or otherwise. It is final.

Debtor's allegations regarding Imperial's Motion fail for another reason, however. Debtor's prior Chapter 11 once was dismissed by this Court pursuant to an Order entered on June 14, 1989 -- almost <u>one month prior to the Trustee's Sale</u> being held. Suspiciously, Debtor's Complaint fails to contain any reference whatsoever to that dismissal order. Pursuant to 11 U.S.C. Section 362 (c)(2)(b), the Automatic Stay in Debtor's prior Chapter 11 case was terminated upon the dismissal of that case. Pursuant to California law, Imperial was thus entitled to hold the trustee's sale so long as it occurred no sooner than seven days

after the entry of that dismissal order. (illegible) requirements with respect to a notice of a trustee's sale and that section only requires that written notice be given in the manner set forth therein. No additional notice is required by be given to any borrower. (U. S. Cold Storage v. Great West Sav. & Loan (1985) 165 Cal.App.3d 1214, 212 Cal.Rptr. 232.) In fact, actual receipt of a notice of sale is not required by California law. The statutory provisions regarding non-judicial foreclosure sale simply mandate certain procedural requirements reasonably calculated to inform a borrower of a foreclosure sale, and that is all. (Lupertino v. Carbahal (1973) 35 Cal.App.3d 742, 747-748. 111 Cal.Rptr. 112) Because the wrongful acts alleged in Debtor's Complaint are not even "wrongful" or "improper" according to Federal Bankruptcy law or California law,

Debtor's Complaint must be dismissed with prejudice.

In fact, Debtor probably never had title to the subject property. In yet another Superior Court action involving Debtor and the subject property, the transfer of title to Debtor was rescinded. Thus, debtor never had title and is not entitled to it now. (See Supplemental Declaration of Dennis Roy, filed in connection with these Defendants' Motion for Relief, attached hereto as Exhibit "C", with exhibits, and incorporated herein by reference.)

V.

ACCORDING TO CALIFORNIA LAW, DEBTOR CANNOT SET ASIDE THE INVOLVED TRUSTEE'S SALE TO THESE DEFENDANTS

It is well-settled that a Bankruptcy Court must apply the law of a forum state in considering matters involving state law. United States v. Butner (1979) 440

U.S. 48, 59 S.Ct. 911.) In addition, when considering a motion to dismiss for failure to state a claim, a federal court must consider the law of the forum state in determining whether a claim for relief is property asserted. (Gay v. Heller (4th Cir. 1958) 252 F.2d 313, 317; Morgan v. American Family Life Assur. Co. of Columbus (D.Ct.Va. 1983) 559 F.Supp. 477, 480; McKenzie v. Fairmont Food Co., (D.C.N.D. Ohio 1969) 305 F.Supp. 163, 165; Copley v. Northwestern Mutual Life Ins. Co. (D.Ct.W.Va. 1968) 295 F.Supp.93,95.)

Pursuant to California law, a foreclosure sale to a bona fide purchaser for value and without notice may not be set aside. In Napue v. Gor-Mey West, Inc. (1985 2d. Dist., Div. 3) 175 Cal.App.3d 608, 220 Cal.Rptr. 799, 802, the Court of Appeal considered a Los Angeles Superior Court decision to set aside a foreclosure

sale. In reversing the trial court, the Court of Appeal specifically stated that:

> "In order to protect a purchaser of a property in a trustee's sale, section 294 provides that a recital in the deed executed pursuant to a power of sale that all procedural requirements have been complied with 'shall constitute prima facie evidence of compliance of such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.' Thus, any failure to comply with the procedural requirements of section 2924 will not affect the validity of the sale in favor of a bona fide purchaser. A sale to a bona fide purchaser is not voidable." [Emphasis added.]

These Defendants were clearly bona

fide purchasers as to the subject property. The instant bankruptcy case had not even been filed when the trustee's sale had occurred, Debtor's prior Chapter 11 case had been dismissed and a Judgment granting relief had been entered with respect thereto which authorized that sale, these Defendants were never even informed of the prior bankruptcy case nor any problems relating to Imperial's trust deed or foreclosure, and these Defendants paid the sum of $433,600.00 for the subject property which clearly constitutes the consideration required by California law. In addition, because no evidence has been presented nor allegations made to say that the trustee's sale was collusive, the bid price paid these Defendants is conclusive as to the value of the subject property. (In re Ehring, supra, 91 B.R. at 901; in re Verna, (Bk. C.D. Cal. 1986) 58 B.R. 246, 247, 252; In re

Madrid, (9th Cir. BAP 1982) 21 B.R. 424, 427.

The Trustee's Deed Upon Sale to those Defendants specifically stated regarding the foreclosure trustee, "All requirements of law regarding the mailing of copies of notices of default and related notices and the posting and publication of copies of the Notice of Sale have been complied with." (See Exhibit "6" to these Defendants' prior Motion for Relief.) By virtue of that statement, these Defendants are entitled to the conclusive presumptions set forth in California Civil Code Section 2924. That section specifically states that:

> "A recital in the deed executed (illegible) the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of

sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice."
(Emphasis added.)

These Defendants are clearly entitled to the conclusive presumptions as established by California Civil Code Section 2924. It cannot be disputed that these Defendants were bona fide purchasers without knowledge who paid reasonable and adequate value for the subject property.

In Wolfe v. Lipsy (1985 2d. Dist., Div. 7) 163 Cal.App.3d 633, 209 Cal.Rptr. 801, 805, the Court of Appeal reversed a Los Angeles Superior Court which had set aside a foreclosure sale. Relying on Section 2924, the Court of Appeal ex-

plained:

"Thus, Civil Code Section 2924 contains two presumptions. One is a rebuttable presumption where the recital in the trustee's deed upon sale is merely prima facie evidence of statutory compliance. (Evid. Code Section 602.) The other is a conclusive presumption where the trustee's sale involves a bona fide purchaser or encumbrancer for value and without notice. 'A conclusive presumption is one that requires that the trier of fact to find that the presumed fact that exists from a finding of the existence of the basic fact. The presumption is conclusive because the adverse party against whom it operated is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact.' (Cita-

tions omitted.)" (Emphasis added.)
(See also, Napue v. Gor-Mey West, Inc., supra, 220 Cal.Rptr at 805; Little v. CFS Service Corp. (1987) 188 Cal.App.3d 1354, 233 Cal.Rptr. 923, 925; 1 Miller & Starr, Current Law of California Real Estate (1975), Section 3:125, p. 548 and cases cited at Fn. 7.)

Clearly, pursuant to a long line of California cases, the trustee's sale to these Defendants may not be set aside because they were bona fide purchasers for value. In addition, the conclusive presumptions set forth in Civil Code Section 2924 further preclude the setting aside of the trustee's sale. As such, Debtor's Complaint must be dismissed with prejudice.

VI.

CONCLUSION

Inasmuch as Debtor has no claim for relief or cause of action against these

answering Defendants pursuant to California law or pursuant to Federal Bankruptcy law, and probably never and is not entitled to title to the subject property, this Motion must be granted and Debtor's Complaint must be dismissed for failure to state any claim for relief against these answering Defendants. These answering Defendants respectfully request that this Court dismiss the Complaint, dismiss the Complaint with prejudice, render a determination in favor of these Defendants with respect to the Complaint, (illegible) the purposes and intents thereof), and that this Court order such other and further relief as it may deem just and proper.

DATED: December 28, 1989

Respectfully submitted,

RICH & EZER

By: /s/ Michael R. Sment

Attorneys for Defendants

DECLARATION OF MICHAEL R. SMENT

I, MICHAEL R. SMENT, hereby declare and state as follows:

1. As to the following facts, they are true and correct of my own personal knowledge except as to those facts stated on information and belief, which I am informed and believe to be true. If called upon to testify herein, I could and would testify competently to the following facts.

2. I am an attorney at law duly licensed to practice before this Court and all the courts of the State of California. I am a principal of Rich & Ezer, a professional corporation, which have been representing Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE J. CRUZ (erroneously sued herein as JOSE CRUZ), and RICHARD MARCZ (erroneously sued herein as RICHARD MARCY) ("these Defendants") herein. I am

the attorney most familiar with this matter and the ongoing bankruptcy litigation herein.

3. On November 3, 1989, these Defendants filed a Motion for Relief From Automatic Stay herein (Ref. No. M9-0419-JR). Attached to that Motion for Relief was a Declaration of Mitchell Ezer along with Exhibits "1" through "7". A true and correct copy of that Motion for Relief with attached exhibits is attached hereto collectively as Exhibit "B", with separate tabs for the seven exhibits originally attached. On November 24, 1989, the Defendants filed a Supplemental Declaration of Dennis Roy with (illegible) with this Court and they are true and correct copies thereof. This Court is therefore requested to take judicial notice of the Motion for Relief, the Supplemental Declaration and those exhibits, which are also admissible pursuant

to the Federal Rules of Evidence. This Court is also requested to take judicial notice of this Court's pleadings, records and files in connection with this bankruptcy case, this adversary proceeding, the Motion for Relief, and Debtor's prior Chapter 11 case (Bk. No. SA88-07521-JR).

4. On December 14, 1989, this Court entered a Judgment Order Vacating Automatic Stay with respect to these Defendants' Motion for Relief. This Judgment and Order specifically provides that the Automatic Stay in the above-entitled bankruptcy case "immediately vacated and extinguished for all purposes, effect November 23, 1989". It further provided that these Defendants were no longer restrained or stayed from taking any action or pursuing any litigation against, with or involving Debtor or the subject property. It also further provided that it would be binding upon

Debtor for 180 days from the date of the hearing (November 23, 1989) on the Motion for Relief. A true and correct ccpy of this Judgment and Order Vacating Automatic Stay is attached hereto as Exhibit "A", and incorporated herein by reference. This Court is requested to take judicial notice of this Judgment and Order, which is also admissible pursuant to Federal Rules of Evidence.

5. Prior to the filing of the Motion for Relief, I called Roy Woolsey, Debtor's counsel, and explained (illegible)

I declare under penalty of perjury according to the laws of the United States and State of California that the foregoing is true and correct.

Executed this 29th day of December 1989 at Los Angeles, California.

MICHAEL R. SMENT

EXHIBIT "A" TO DECLARATION OF SMENT IN SUPPORT OF MOTION TO DISMISS ETC.

FILED DEC 13 1989

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re	Bk. No. SA89-06771-JR
BFP, a Partnership,	CHAPTER 11
Debtor.	Ref. No. M9-0419-JR
JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY,	JUDGMENT AND ORDER VACATING AUTOMATIC STAY

* * *

Movants

vs.

BFP, a Partnership,

Respondent.

The Motion for Relief From Automatic Stay filed by Movants, JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE came on regularly for hearing on November 28, 1989 at 9:30 a.m. before the Honorable John Ryan, United States Bankruptcy

Judge, presiding. Movants appeared through their counsel, Michael R. Sment of Rich & Ezer. Respondent/Debtor BFP, a Partnership, appeared through Sheldon Foreman, who was specially appearing for Roy B. Woolsey, although no responsive or opposing pleadings were filed by or on behalf of Respondent/Debtor.

The Court having considered the pleadings and records on file herein, and the Supplemental Declaration of Dennis Roy, with good cause appearing therefor, makes its Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Automatic Stay in the above-entitled bankruptcy case is immediately vacated and extinguished for all purposes, effective November 1989, as to Movants JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE. Movants are no longer restrained or stayed from taking any

action or pursuit of any litigation against, with or involving Respondent/Debtor to the real property generally described as 225 Via Genoa, Lido Isle, Newport Beach, California, and legally described on Exhibit "1" to the Motion for Relief which exhibit is incorporated herein by reference.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Judgment and Order Vacating Automatic Stay shall be binding on Respondent/Debtor in any bankruptcy proceedings filed by Respondent/Debtor within 180 days from the date of the hearing on Movant's Motion for Relief, and any such future Automatic Stay shall be null and void with respect to Movants, their assignees and/or successors-in-interest and/or their interest(s) in the subject property.

DATED: 13 DEC 1989

JOHN RYAN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "B" TO SMENT'S DECLARATION IN SUPPORT OF MOTION TO DISMISS ETC.

FILED
1989 NOV 3 pm 4:05

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re	Bk. No. SA89-06771-JR
BFP, a Partnership,	CHAPTER 11
Debtor.	Ref. No. M9-0419-JR
JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE,	MOTION FOR RELIEF FROM AUTOMATIC STAY [11 U.S.C. 362(d)]; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MITCHEL E. EZER IN SUPPORT THEREOF
Movants,	Place: Courtroom 520
vs.	
BFP, a Partnership, Respondent.	

I.

STATEMENT OF FACTS

Movants complain and allege as follows:

1. That on or about October 25, 1988 at 1:40 p.m., Respondent/Debtor BFP,

a Partnership ("Respondent/Debtor" herein) filed a Chapter 11 Petition with this Court and commenced the above-entitled Bankruptcy case. As of at least November 2, 1989, no plan of reorganization has been filed herein, nor has a trustee been appointed herein.

2. Movants are uninformed as to the correct status or capacity of Respondent/Debtor inasmuch as Respondent/Debtor alleges that it is "a Partnership," without specifying whether it is a California general partnership, California limited partnership or some other partnership from some other state of the United States. Respondent/Debtor has alleged that it has been doing business in the County of Orange for at least the preceding 180 days.

3. That at all times material herein, Movants JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL

OSBORNE and WILLIAM LITTLE (collectively, "Movants" herein), were and are individuals residing in the State of California, and doing business in the County of Orange and/or the County of Los Angeles.

4. The real property which is the subject matter of this Motion, and upon which Respondent/Debtor does not do business or otherwise occupy, is generally described as 225 Via Genoa, Lido Isle, Newport Beach, California ("subject property" herein), is located in the County of Orange, State of California, and is legally described on Exhibit "1" which is attached hereto and incorporated herein by reference.

5. On August 18, 1989, Respondent/Debtor and others commenced an action in the Superior Court for the County of Orange (Case No. 600205) against Movants and Imperial Savings to quiet title, for declaratory relief, to

impress a trust and for damages in connection with the subject property. A true and correct copy of the Superior Court Summons and Complaint are attached hereto collectively as Exhibit "2" and incorporated herein by reference. In connection with the filing of this action, Respondent/Debtor and others also recorded a Notice of Pending Action against the subject property. On or about October 12, 1989, Movants filed a Demurrer to the Superior Court Complaint along with a Motion for Order Expunging the Lis Pendens, with a hearing scheduled on the Demurrer and the Motion for October 1989 at 9:30 a.m. in Department 23 of the Superior Court. True and correct copies of the Demurrer and Motion to Expunge (with exhibits) are attached hereto as Exhibits "3" and "4", respectively, and incorporated herein by reference. On October 25, 1989 -- less than

two days before that scheduled hearing, and apparently to avoid an undesirable outcome in the Superior Court action -- Respondent/Debtor commenced the instant bankruptcy case. That hearing has been continued by the Superior Court to November 14, 1989.

6. This is at least the second bankruptcy case involving Respondent/Debtor filed within this Court within the past ten months. On or about December 21, 1988, an involuntary Chapter 11 Petition was filed against Respondent/Debtor in this Court (Bk. No. SA 88-07521-JR).

7. Imperial Savings Association ("Imperial" herein) (a defendant in the pending Superior Court action) was the beneficiary of a first trust deed encumbering the subject property. Pursuant to a Judgment and Order Vacating Automatic Stay entered by this Court on

June 14, 1989, Imperial obtained relief from Automatic Stay in that prior Chapter 11 case to proceed with a foreclosure and hold a trustee's sale of the subject property. A true and correct copy of that Judgment is attached hereto as Exhibit "5" and incorporated herein by reference.

8. Pursuant to an Order entered on June 14, 1989, the prior Chapter 11 Involuntary Petition was dismissed.

9. Pursuant to the Judgment and Order Vacating Automatic Stay, on July 12, 1989 -- over 3-1/2 months prior to the filing of this Bankruptcy case -- the subject property was sold at a scheduled Trustee's Sale, conducted on behalf of Imperial, to Movants for the sum of $433,600.00. A Trustee's Deed Upon Sale was issued on July 18, 1989, and recorded on July 21, 1989, as Instrument No. 89-385080 with the Official Records of Orange County. A true and correct copy

of that Trustee's Deed is attached hereto as Exhibit "6" and incorporated herein by reference. Pursuant to California law, title to the subject property became vested in Movants upon the delivery and execution of the Trustee's Deed.

10. On or about July 14, 1989, Respondent/Debtor and others filed a previous action in the Superior Court for the County of Los Angeles (Case No. 596890) in which they attempted to attack the validity of the trustee's sale. After discussions with Movant DENNIS ROY; that previous action was dismissed, a lis pendens recorded in connection therewith was withdrawn and the occupant of the subject property (Sheldon Foreman) voluntarily vacated it and surrendered it to Movants. A true and correct copy of the Declaration of DENNIS ROY (filed in support of Movant's Motion to Expunge) in this regard is attached hereto (without

exhibits) to Exhibit "7" and incorporated herein by reference.

11. Respondent/Debtor clearly voluntarily commenced the pending Superior Court action and prior Superior Court action. The instant Bankruptcy filing was apparently caused by Movant filing of their Demurrer and their Motion to Expunge, which contained significant California authorities indicating that involved trustee's sale cannot be set aside under California state law. Respondent/Debtor clearly became concerned with the scope, effect and significance of these authorities, and commenced the instant bankruptcy case to avoid the hearings on the Demurrer and the Motion to Expunge. The Demurrer and Motion to Expunge were filed (as required) as Movants' first response and defense to the Superior Court action. It is clearly unreasonable and inequitable to allow

Respondent/Debtor to commence and prosecute a state court action, and then file this Bankruptcy case to obtain an Automatic Stay to use as a sword to prevent Movants and other defendants from legitimately defending or responding to that action, thus resulting in an unfair and inequitable advantage to Respondent/Debtor. Respondent/Debtor's conduct appears to be even more improper and inequitable considering the fact that it obtained a dismissal of a prior Chapter 11 Petition and case only approximately 3-1/2 months

12. It would also appear that the instant Bankruptcy case was not filed for a proper bankruptcy purpose or within the meaning and intent of the United States Bankruptcy Code. Respondent/Debtor's Schedule B filed herein states that "The foreclosure sale is subject to being set aside in that the sale was for less than

a reasonable equivalent value." Movants contend, however, that the current law and authorities in the Ninth Circuit do not permit foreclosure sales to be set aside on that basis. In fact, Movants contend that the applicable law and authorities in the Ninth Circuit would preclude the involved petition foreclosure sale from being affected at all by this Bankruptcy case and would also require a finding that the purchase price paid at the foreclosure sale constituted the reasonable equivalent value of the subject property.

13. Movants allege that Respondent/Debtor's filing of instant Bankruptcy case is a delay tactic to prevent the hearing on Movants' Demurrer and Motion to Expunge, originally scheduled for October 27, 1989 and now continued to November 14, 1989. Otherwise, there can be no explanation for Respondent/Debtor's

delay in commencing this Bankruptcy case over 3-1/2 months after the involved foreclosure sale occurred, as opposed to filing a case within a short time after that sale. In addition, there can be no explanation for why Respondent/Debtor filed or commenced the Superior Court action, and then commenced this Bankruptcy case approximately 60 days later, except for an inexcusable attempt to avoid Movants' legitimate and properly filed Demurrer and Motion. Inasmuch as this Court must follow California state law as to foreclosure sales, and inasmuch as the Ninth Circuit Court of Appeals and Bankruptcy Appellate Panel for the Ninth Circuit have indicated that pre-petition foreclosure sales may not be set aside under the Bankruptcy Code, the filing and prosecution of the instant Chapter 11 case clearly constitutes an abuse and misuse of this Bankruptcy Court, the

United States Bankruptcy Code and the bankruptcy system in general. This Court should not condone such action or conduct in an already over-crowded and congested court system.

14. By this Motion, Movants seek relief from the Automatic Stay in the above-entitled bankruptcy case for all purposes, or in the alternative, for authority to continue with the prosecution, discovery, defense and litigation in the pending Superior Court action up to and including a final judgment and/or oppose any appeals by Respondent/Debtor or others. Under the latter alternative, if a judgment or judgments for money, damages or costs are rendered against Respondent/Debtor in the Superior Court or otherwise, Movants will return to this Court for further order(s) before proceeding with any execution on or collection of any such judgment(s).

15. The granting of such relief to Movants would not act as the detriment or prejudice of this Court, any creditors, Respondent/Debtor or any party involved in the above-entitled bankruptcy case. In view of at least the two Superior Court actions filed by Respondent/Debtor against Movants, the time, effort and funds expended with respect thereto, the fact that the Superior Court actions contend that the foreclosure sales were conducted in violation of California law, the fact that this court must be controlled by California law with respect thereto, and in view of the fact that the Superior Court was (and now is) set to hear the Demurrer and Motion to Expunge, it would be totally inequitable and unfair not to grant the relief sought by Movants herein.

16. This court has jurisdiction over this action pursuant to the provi-

sions of Title 28 U.S.C. Section 1334, Title 28 U.S.C. Section 157(b)(2)(G) and Title 11 U.S.C. Section 362(d). The underlying Bankruptcy case is Case No. SA 89-06771-JR, which is now pending in his Court and District.

17. PLEASE TAKE NOTICE that the Local Rules of the United States Bankruptcy Court require that all Respondents file a formal response to this Motion at least five court days prior to the scheduled hearing on this Motion.

18. Pursuant to the Federal Rules of Evidence and other applicable authorities, Movants request this Court to take judicial notice of the pleadings, recorded instruments and other writings attached hereto as exhibits.

II.

POINTS AND AUTHORITIES

Section 362(d) of the United States Bankruptcy Code provides, in pertinent

part, that:

"(d) On request of a party in interest and later notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization." (Emphasis added.)

The Bankruptcy Court in in Re Philadelphia Athletic Club, 9 B.R. 280, 282 (1981 Bk. E.D. Penn.) granted relief from the automatic stay so that a Plaintiff could proceed with its state

court action against the debtor and stated:

"At the present, the state court plaintiff has only an unliquidated claim against the debtor. That claim must be liquidated in order for the debtor's case under Chapter 11 to proceed. The question is what will be the most expeditious and fair way to liquidate that claim. In the instant case there have already been lengthy proceedings in the state court. To require the state court plaintiff to start those proceedings all over again in this court would clearly be a waste of judicial and legal time and effort. Since the court state action is almost at an end, the most expeditious way to liquidate the claim of the plaintiff is to permit the state court action to be

concluded. This will cause the least delay and expense for all concerned."

The Court also cited Collier on Bankruptcy in noting that relief from the automatic stay under Section 362(d)(1) may be granted for cause including a situation here:

"[T]he liquidation of a claim may be more conveniently and speedily determined in another form [sic. forum?]. 2 Collier on Bankruptcy Section 362.07(3) 15th ed. 1980) (Footnotes omitted." (Id.)

The Bankruptcy Court in In re Central Hobron Assoc., 36 B.R. 106, 108 (1983 Bk. Haw.), also granted relief from the automatic stay so that a state court action could continue against the debtor. The Court noted that:

"Since Plaintiffs only seek to resolve the matter of Debtor's

liability under the letter agreement of December 12, 1980 and do not seek to enforce any judgment against Debtor's estate, the Court finds that the lifting of the stay will expedite resolution of the two cases without multiplicity of suit and without interference of the administration of Debtor's estate." (See also, In Re Hunter, 32 B.R. 140, 142 (1983 Bk. S.D. Flor.); In Re Frigitemp Corp., 8 B.R. 284, 288-290 (S.D.N.Y. 1981).)

11 U.S.C. Section 547 does not convey any right or power to a debtor to invalidate or set aside a pre-petition foreclosure sale. (In Re Ehring, (1988 9th Cir. BAP) 91 B.R. 897, 900.)

11 U.S.C. Section 548 does not convey any right or power to a debtor to invalidate or set aside a pre-petition foreclosure sale. (In Re Madrid (1984 9th

Cir. BAP) 725 F.2d 1197, 1200-01.)

State substantive law must be followed by a federal bankruptcy court. (Butner v. U.S. (1979) 440 U.S. 48, 99 S.C. 914.)

Pursuant to California law, a foreclosure sale to a good faith purchaser who pays valuable consideration may not be set aside. (Calif. Civil Code Section 2924; Napue v. Gor-May West, Inc. (1985) 175 Cal.App.3d 608, 220 Cal.Rptr. 799, 802; Wolfe v. Lipsy, (1985) 163 Cal.App.3d 633, 209 Cal.Rptr. 801, 805.)

III.

CONCLUSION

WHEREFORE, Movant moves for a Judgment and/or Order from this Court as follows:

1. For a Judgment and/or Order granting Movants, their agents, assignees and/or successor-in-interest complete relief from the Automatic Stay in the

above-entitled Bankruptcy case for all purposes, or granting a modification or conditioning of the Automatic Stay, so that defense of, and litigation and discovery in the pending Orange County Superior Court Action (Case No. 600205) or any companion or related proceeding(s)/actions/appeals thereto, may be totally continued against Respondent/Debtor for any and all purposes;

2. In the alternative, for Judgment and/or Order granting Movants, their agents, assignees and/or successor-in-interest complete relief from the Automatic Stay in the above entitled Bankruptcy case, or modifying or conditioning the Automatic Stay, so that defense of, and litigation and discovery in the pending Orange County Superior Court Action (Case No. 600205), or any companies or related proceedings(s)/ actions/ appeals thereto, may be continued against

Respondent/Debtor and including a final judgment and/or opposing any appeals by Defendants;

3. For such other Judgment(s) and/or Order(s) regarding the adequate protection of Movants' interest in the subject property, the pending Superior Court action or any other acts, proceedings or matters, or of an equitable nature, as this Court deems appropriate and just;

4. For attorneys' fees and./or costs of suit incurred herein, or any other appropriate sanctions, in accord with United States Bankruptcy Code, local and Federal Bankruptcy Rules, the underlying agreements between Movants and Respondent/Debtor and its related entities, and all other applicable rules, statutes, regulations, and/or principles of equity;

5. For such other and further

relief as this Court may deem just and proper.

DATED: November 1, 1989

Respectfully submitted,

RICH & EZER

MICHAEL R. SMENT

DECLARATION OF MITCHEL J. EZER

I, MITCHEL J. EZER, declare and state as follows:

1. As to the following facts, I know them to be true of my own knowledge and, if called upon to testify herein, I could and would testify competently to those facts:

2. I am an attorney duly licensed to practice in all the courts of the Stat of California and in the Central District of the United States District Court. I am a principal in the law firm of Rich & Ezer, a Professional Law Corporation, attorney for Movants, JOSE CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE (collectively, "Movants" herein. I am the attorney with our firm most familiar with the pending state court litigation involving Respondent/Debtor BFP, a Partnership ("Respondent/Debtor" herein) and Movants.

3. That on or about October 25, 1988 Respondent/Debtor BFP, a Partnership ("Respondent/Debtor" herein) filed a Chapter 11 Petition with this Court and commenced the above-entitled Bankruptcy case. As of at least November 2, 1989, no plan or reorganization has been filed herein, nor has a trustee been appointed herein.

4. Movants are uninformed as to the correct status of capacity of Respondent/Debtor inasmuch as Respondent/Debtor alleges that it is "a Partnership" without specifying whether it is a California general partnership, California limited partnership or some other partnership from some other state of the United States. Respondent/Debtor has alleged that it has been doing business in the County of Orange for at least the preceding 180 days.

5. That at all times material

herein, Movants JOSE J. CRUZ, RICHARD MARCZ, DENNIS ROY, ARTHUR RITZ, PAUL OSBORNE and WILLIAM LITTLE (collectively, "Movants" herein), were and are individuals residing in the State of California, and doing business in the County of Orange and/or the County of Los Angeles.

6. The real property which is the subject matter of this Motion, and upon which Respondent/Debtor does not do business otherwise occupy, is generally described as 225 Via Genoa, Lido Isle, Newport Beach, California ("subject property" herein), located in the County of Orange, State of California, and is legally described on Exhibit "1" which is attached hereto and incorporated herein by reference.

7. On August 18, 1989, Respondent/Debtor and others commenced an action in the Superior Court for the County of

Orange (Case No. 600205) against Movants and Imperial Savings to quiet title, for declaratory relief, to impress a trust, and for damages in connection with the subject property. A true and correct copy of the Superior Court Summons and Complaint are attached hereto collectively as Exhibit "2" and incorporated herein by reference. In connection with the filing of this action, Respondent/Debtor and others also reversed a Notice of Pending Action against the subject property. On or about October 12, 1989 Movants filed a Demurrer to the Superior Court Complaint along with a Motion For Order Expunging the Lis Pendens, with a hearing scheduled on the Demurrer and the Motion for October 27, 1989 at 9:30 a.m. in Department 23 of the Superior Court. True and correct copies of the Demurrer and Motion to Expunge (without exhibits) are at-

tached hereto as Exhibits "3" and "4", respectively, and incorporated herein by reference. On October 25, 1989 -- less than two days before that scheduled hearing, and apparently to avoid an undesirable outcome in the Superior Court action -- Respondent/Debtor commenced the instant bankruptcy case. That hearing has been continued by the Superior Court to November 14, 1989.

8. This is at least the second bankruptcy case involving Respondent/Debtor filed with this Court within the past ten months. On or about December 21, 1988, an involuntary Chapter 11 Petition was filed against Respondent/Debtor in this Court (Bk. NO.SA 88-07521-JR).

9. Imperial Savings Association ("Imperial" herein) (a defendant in the pending Superior Court action) was the beneficiary of a first trust deed

encumbering the subject property. Pursuant to a Judgment and Order Vacating Automatic Stay entered by this Court on June 15, 1989, Imperial obtained relief from Automatic Stay in that prior Chapter 11 case to proceed with foreclosure and hold a trustee's sale of the subject property. A true and correct copy of that Judgment is attached hereto as Exhibit "5" and incorporated herein by reference.

10. Pursuant to an Order entered on June 14, 1989, the prior Chapter 11 Involuntary Petition was dismissed.

11. Pursuant to the Judgment and Order Vacating Automatic Stay, on July 12, 1989 -- over 3-1/2 months prior to the filing of this Bankruptcy case -- the subject property was sold at a scheduled Trustee's Sale, conducted on behalf of Imperial, to Movants for the sum of $433,000.00. A Trustee's Deed Upon Sale

was issued on July 18, 1989, and recorded on July 21, 1989, as Instrument No. 89-385080 with the Official Records of Orange County. A true and correct copy of that Trustee's Deed is attached hereto as Exhibit "6" and incorporated herein by reference. Pursuant to California law, title to the subject property became vested in Movants upon the delivery and execution of the Trustee's Deed.

12. On or about July 14, 1989, Respondent/Debtor and others filed a previous action in the Superior Court for the County of Los Angeles (Case No. 596890) in which they attempted to attack the validity of the trustee's sale. After discussions with Movant DENNIS ROY, that previous action was dismissed, a lis pendens recorded in connection therewith was withdrawn and the occupant of the subject property (Sheldon Foreman) voluntarily vacated it and surrendered it to

Movants. A true and correct copy of a Declaration by DENNIS ROY (filed in support of Movant's Motion to Expunge) in this regard is attached hereto (without exhibits) as Exhibit "7" and incorporated herein by reference.

13. Respondent/Debtor clearly voluntarily commenced the pending Superior Court action and prior Superior Court action. The instant Bankruptcy filing was apparently caused by Movant filing of their Demurrer and their Motion to Expunge, which contained significant California authorities that the involved Trustee's sale cannot be set aside under California state law. Respondent/Debtor clearly became concerned with the scope, effect and significance of these authorities, and commenced the instant bankruptcy case to avoid the hearing on the Demurrer or Motion to Expunge. The Demurrer and Motion to Expunge were filed

(as required) as Movants' first response and defense to the Superior Court action. It is clearly unreasonable and inequitable to allow Respondent/Debtor to commence and prosecute a state court action, and then file this Bankruptcy case to obtain an Automatic Stay to use as a sword to prevent Movants and other defendants from legitimately defending or responding to that action, thus resulting in an unfair and inequitable advantage to Respondent/Debtor. Respondent/Debtors conduct appears to be even more improper and inequitable considering the fact that it obtained a dismissal of a prior Chapter 11 Petition and case only approximately 3-1/2 months

14. It would also appear that the instant Bankruptcy case was not filed for a proper bankruptcy purpose or within the meaning and intent of the United States Bankruptcy Code. Respondent/Debtor's

Schedule B filed herein states that "the foreclosure sale is subject to being set aside in that the sale was less than a reasonable equivalent value." Movants contend, however, that the current law and authorities in the Ninth Circuit do not permit foreclosure sales to be set aside on that basis. In fact, Movants contend that the applicable law and authorities in the Ninth Circuit would preclude the involved petition foreclosure sale from being affected at all by this Bankruptcy case and would also require a finding that the purchase price paid at the foreclosure sale constituted the reasonable equivalent value of the subject property.

15. Movants allege that Respondent/ Debtor's filing of the instant Bankruptcy case is a delay tactic to prevent the hearing on Movant's Demurrer and Motion to Expunge, originally scheduled for

October 27, 1989, and now continued to November 14, 1989. Otherwise, there can be no explanation for Respondent/Debtor's delay in commencing this bankruptcy case over 3-1/2 months after the involved foreclosure sale occurred, as opposed to filing a case within a short time after that sale. In addition, there can be no explanation for why Respondent/Debtor filed or commenced the Superior Court action, and then commenced this Bankruptcy case approximately 60 days later, except for an inexcusable attempt to avoid Movants; legitimate and properly filed Demurrer and Motion. Inasmuch as this Court must follow California state law as to foreclosure sales, and inasmuch as the Ninth Circuit Court of Appeals and Bankruptcy Appellate Panel for the Ninth Circuit have indicated that pre-petition foreclosure may not be set aside under the Bankruptcy Code, the filing and

prosecution of the instant Chapter 11 case clearly constitutes abuse and misuse of this Bankruptcy Court, the United States Bankruptcy Code and the bankruptcy system in general. This Court should not condone such action or conduct in an already overcrowded and congested court system.

I declare under penalty of perjury according to the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 2nd day of November, 1989 at Los Angeles, California.

/s/ Mitchel J. Ezer
MITCHEL J. EZER

EXHIBIT "1"

LEGAL DESCRIPTION

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 35 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

EXHIBIT "2"

FILED

AUGUST 18, 1989

* * *

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

SHELDON L. FOREMAN;	CASE NO. 600205
BFP, a Partnership, composed of WAYNE L. PEDERSEN, MARLENE PEDERSEN and RUSSELL J. BARTON; RUSSELL J. BARTON,	COMPLAINT TO QUIET TITLE, FOR DECLARATORY RELIEF, TO IMPRESS A TRUST, AND FOR DAMAGES
Plaintiffs,	
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; PAUL OSBORNE;	
* * *	
Defendants.	

Plaintiffs allege that:

COMMON ALLEGATIONS

1. At all times herein from August 27, 1987 to the end of 1987, BFP was a partnership composed of WAYNE L. PEDERSEN, MARLENE PEDERSEN, who is also known as MARLENE M. PEDERSEN, plaintiff RUSSELL J. BARTON, WAYNE PEDERSEN AND MARLENE PEDERSEN assigned their interest to OFF-ROAD VEHICLES - RECREATION FAMILY CAMP-GROUND, INC. Subject to the effect of that assignment, it is a co-partnership.

2. At all times since September 29, 1987, defendant IMPERIAL SAVINGS & LOAN ASSOCIATION has been and now is a corporation organized and existing under the laws of the state of California.

3. Defendants PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ, RICHARD MARCY, and Does 1 to 10, purchased the real property described on Exhibit A at a Trustee's Sale and Does 1 to 10 are successors in interest of some interest therein.

4. The true names and capacities, whether individual, corporate, associate, or otherwise of defendants named herein as Does 1 though 10, inclusive, are unknown to plaintiff, who therefore sues said defendants by such fictitious names. Plaintiff will ask leave of court to amend this Complaint to show the true names and capacities of such defendants when the same have been ascertained.

5. At all times prior to July 29, 1989, ANN FANT FOREMAN and plaintiffs BFP and SHELDON L. FOREMAN have been and were in open, notorious, conspicuous and exclusive possession of said real property and defendants, and each of them, had notice of the rights and claims of said BFP, SHELDON L. FOREMAN and ANN FANT FOREMAN.

6. At all times herein mentioned, prior to the recording on August 25, 1987, of the deed hereinafter referred to

executed by SHELDON L. FOREMAN and ANN FANT FOREMAN, they owned the real property in the City of Newport Beach, County of Orange, described as Exhibit "A", attached hereto and hereby incorporated herein.

7. On or about July 18, 1987, plaintiff RUSSELL J. BARTON and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, orally agreed and agreed in writing that WAYNE L. PEDERSEN be the buyer of said real property, that said WAYNE L. PEDERSEN give an option to said plaintiff to purchase said real property during the period of One Hundred Eighty (180) days from the date of recordation of the deed describing said real property, for a sum equal to indebtedness secured by said real property consented to by RUSSELL J. BARTON, that defendants not convey or encumber said real property otherwise during said option period without consent

of plaintiff RUSSELL J. BARTON that if said plaintiff exercise said option he pay 25% of profits to said WAYNE L. PEDERSEN.

8. On or about August 3, 1987, plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN and WAYNE L. PEDERSEN made, executed and delivered escrow instructions in and by which they named Cress Escrow Corporation in Irvine, California, as the holder and agreed to the sale of said real property by said plaintiffs and purchase of it by said WAYNE L. PEDERSEN. WAYNE L. PEDERSEN promised, represented, warranted and agreed to deliver to plaintiff, Three Hundred Fifty-Six Thousand, Two Hundred Fifty ($356,250.00) Dollars being the proceeds of a loan to be secured by the first trust deed describing said property, securing a note for approximately Three Hundred Fifty Six Thousand, Two Hundred Fifty ($356,250.00)

Dollars and certain rare coins to be delivered.

9. Thereafter, the parties to said escrow amended the Escrow Instructions to provide that said Marlene Pedersen be a party as a buyer.

10. During August of 1987, newspapers stated that WAYNE L. PEDERSEN was under investigation for alleged fraudulent sales of rare coins and plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN voiced to WAYNE L. PEDERSEN concerns regarding the same; the parties to the escrow orally agreed that in place of the rare coins, a partnership be formed, that WAYNE L. PEDERSEN AND MARLENE M. PEDERSEN deed to it and it make, execute and deliver a note and a trust deed describing said real property and plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries to secure said note that said note be payable to SHELDON

L. FOREMAN and ANN FANT FOREMAN in the sum of Two Hundred Thousand Dollars ($200,000.00), and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN promised, represented, warranted and agreed that they would deliver such note and trust deed, that the escrow close, and that plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN may remain in possession of said real property until delivery of said Two Hundred Thousand Dollars ($200,000.00) note and trust deed in good and sufficient form and recording thereof and until RUSSELL J. BARTON was ready to commence remodeling; later, in August, the parties orally agreed that WAYNE L. PEDERSEN and MARLENE M. PEDERSEN deed to BFP and that BFP execute the trust deed naming SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries.

11. Pursuant to said oral agreement, the following occurred and docu-

ments which were recorded were recorded in the Official records of Orange County:

A. A deed dated August 12, 1987, describing SHELDON L. FOREMAN and ANN FANT FOREMAN as grantors, WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantees and describing said real property. Said deed was recorded on August 25, 1987 as Instrument No. 87-481934.

B. A deed of trust describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as trustors, L. C. Service Corporation trustee, Loan Marketing and Brokers Services, Inc., beneficiary, and describing said real property, securing a note for Three Hundred Fifty-Six Thousand Two Hundred Fifty Dollars ($356,250.00) and interest at 12% per annum, principal and interest payable Three Thousand Six Hundred Sixty-four and 44/100 Dollars ($3,604.44) on the first day of each month beginning October 1, 1987. Said

trust deed was recorded on August 5, 1987 as Instrument No. 87-431935. Said trust deed was assigned by said Loan Marketing and Brokers Services, Inc., to Abbey Mortgage Corporation by assignment recorded August 25, 1987, as Instrument No. 87-841936, and by it to Imperial Savings Association by assignment recorded August 25, 1987 as Instrument No.87-841937.

C. On or about August 26, 1987, plaintiff RUSSELL J. BARTON and WAYNE L. PEDERSEN and MARLENE PEDERSEN made, entered into and delivered a partnership agreement dated August 26, 1987, whereby BFP, a partnership, is formed.

D. A deed dated August 27, 1987 describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN, as grantors, plaintiff BFP, a general partnership, as the grantee, and said real property was recorded on September 16, 1987, as Instrument No. 87-524675. On September 11, 1986, Randy

Jones, being duly sworn, said to Patrick Wruck, notary, that he saw said grantors execute and deliver said deed.

E. On August 27, 1987, plaintiff B.F.P. made, executed and delivered a deed of trust naming SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries and describing said real property securing a note for Two Hundred Thousand Dollars ($200,000.00). Deed of trust was fully recorded on September 16, 1987 as Instrument No.87-524676. A copy of said deed of trust is marked Exhibit A and attached hereto. In and by said trust deed, it was agreed that in the event of a lawsuit between the parties, the prevailing party would be entitled to reasonable attorney's fees. Said note provided that interest at 10% per annum be paid monthly beginning September 27, 1987, and principal be dean or before February 27, 1988.

12. Plaintiffs performed all of the

covenants and obligations to be performed by them in said agreements, including said purchase agreement, said partnership agreement, and the escrow instructions as amended.

13. On or about September 29, 1987, without the consent, permission or approval and without prior knowledge of plaintiffs WAYNE L. PEDERSEN an MARLENE M. PEDERSEN made, executed and delivered a deed whereby they purported to convey said property to OFF-ROAD VEHICLES-RECREATION & FAMILY CAMPGROUND, INC., a California corporation. A copy of said deed is attached hereto as Exhibit B but incorporated herein by reference. At the time of the making and acceptance of said deed, the grantee knew and should have known of plaintiffs' possession of and claims to said real property.

14. No payments have been made on either of the notes secured by trust

deeds on said real property except the payment by SHELDON L. FOREMAN on the note secured by the first trust deed in order to reinstate it during 1988.

15. In 1988, after plaintiff SHELDON L. FOREMAN had reinstated the note secured by the first trust deed and while plaintiffs BFP and SHELDON L. FOREMAN litigated their claims against OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., defendant IMPERIAL SAVINGS & LOAN ASSOCIATION caused to be given a notice of default under the first deed of trust and thereafter noticed sale to take place in December of 1988. The notice of sale stated that the sale would be for cash and designated no equivalents allowed by Section 2924(b) of the California Civil Code. A copy of the notice is marked as Exhibit C and incorporated herein.

16. In December of 1988, OFF-ROAD

VEHICLES - RECREATION & FAMILY CAMP-GROUND, INC., filed an involuntary Petition Under Chapter 11 of the U. S. Bankruptcy Code alleging that BFP, a Partnership, was insolvent. Sid petition was filed in the U. S. Bankruptcy Court for the Central District of California sitting in Santa Ana No. SA-88-07521-JR.

17. In said petition, it was alleged that BFP's address was 3303 F-1 Harbor Blvd., Costa Mesa, California. BFP, a partnership, filed a response to said petition and showed in the upper left-hand corner of the first page that it was filed in pro per and that its address was 3051 Yukon Circle, Costa Mesa, California 92626.

18. At a hearing in connection with the petition for adjudication under Chapter 11 held on or about May 11, 1988, counsel for IMPERIAL SAVINGS & LOAN ASSOCIATION appeared at the hearing and knew

at that time in that hearing that BFP was present by its general partner, RUSSELL BARTON, and by a claimed partner, OFF-ROAD VEHICLES, by its president, GARY HENIG, and its counsel, Armando Lopez, and BFP and RUSSELL BARTON were present by their counsel, Roy B. Woolsey.

19. At said time and place, plaintiffs BFP and SHELDON L. FOREMAN and ANN FANT FOREMAN requested that the sale on foreclosure be continued until after July 17, 1989, the date on which the quiet title action in the state court determining title to said real property was set for trial. Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION stated that it would not conduct the sale until it got a copy of the order, meaning a copy of the order of the Bankruptcy Court on the pending petition for adjudication under Chapter 11.

20. On or about May 10, 1989,

defendant IMPERIAL SAVINGS & LOAN ASSOCIATION filed in said matter a Motion for an Order Granting Relief from the Automatic Stay and, thereafter, on May 22, 1989, caused to be executed an affidavit of service stating that the services of a copy of the notice of motion, together with a motion and declaration was served on BFP, a Partnership, by mailing to 3303 F-1 Harbor Boulevard, Costa Mesa, California.

21. BFP had not been at 3303 F-1 Harbor Boulevard, Costa Mesa, California for over a year and all of the parties hereto knew that it was the policy of the United States post office not to forward mail for more than one year from the time of a change of address.

22. No copy of said notice of motion, motion or declaration was ever received by BFP, and plaintiffs are informed and believe and, based upon said

information and belief allege, that the envelope containing the notice of hearing, motion, and declaration was returned to the office of counsel for defendant, Imperial Savings Association, and that defendant did not know that said motion had been filed and concealed those facts from plaintiffs.

23. Said notice stated that there would be a hearing on said motion on June 12, 1989. Thereafter, the Bankruptcy Court, not realizing that BFP had not been served, made an order granting said motion. Notwithstanding that BFP had not appeared at said hearing and had no knowledge thereof, IMPERIAL SAVINGS & LOAN ASSOCIATION forwarded a Judgment and Order Vacating the Automatic Stay to the Bankruptcy Court together with an affidavit that BFP was served by mailing to 3033 F-1 Harbor Blvd., Santa Ana, California. Said copies allegedly so served

were never received by plaintiffs, or any of them. Plaintiffs are informed and believe, and based upon such information and belief allege, that the post office returned the same to counsel for IMPERIAL SAVINGS and that IMPERIAL SAVINGS knew that said order was entirely without notice to or knowledge of the plaintiffs.

24. In 1988, plaintiff SHELDON L. FOREMAN paid $32,000.00 to Imperial Savings to reinstate the trust deed and note and from time to time to discuss the pendency of the foreclosure sale with Imperial and that told plaintiff that he would reinstate, but not until the last minute, hoping that the matter of title had been determined between him and Off-Road Vehicles.

25. Plaintiffs are informed and believe, and based thereon allege, that in May of 1989, defendant IMPERIAL SAVINGS informed an agent of plaintiffs that

said defendant would give notice of the foreclosure sale it if was to occur, and it did not do so. The beneficiaries under the deed of trust led plaintiffs to believe that there would be no foreclosure sale until after what was determined in the Superior Court trial then set for July 17, 1989, and plaintiffs believed there would be no sale until after July 17, 1989. The trustee under the deed of trust promised a notice of continuance of the sale but did not provide the same and by reason thereof the sale was invalid.

26. Plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN had heard from said agent and reasonably understood and believed that the sale would not take place until after the trial of the quiet title action then scheduled for July 17, 1980.

27. Without any notice to plaintiffs, said sale was conducted on or

about July 12, 1989. Said property was then worth over $725,000.00. Defendants, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCY, who were the purchasers at the sale, bid $433,000.00 for said property.

28. Plaintiffs are informed and believe, and based upon such information and belief allege, that said $433,000.00 was not paid on the date of the sale in cash or any equivalent of cash, but that the same was paid later. At no time did plaintiffs consent to any sale, and at no time did they consent to any sale other than for cash.

29. Prior to the commencement of the above entitled matter and after said sale, plaintiffs offered to pay said defendant the sum of $433,000.00 together with an additional $25,000.00 for the property. Defendants refused to accept said offer and refused to convey said

property.

FIRST CAUSE OF ACTION

(QUIET TITLE)

As and for the first cause of action, as a cause of action in quiet title, against all defendants, plaintiffs allege that:

30. Paragraphs 1 through 24 hereinabove are hereby incorporated herein by reference.

31. Plaintiffs have the right to the immediate and exclusive possession of said real property subject to said deed of trust, a copy of which is attached as Exhibit A hereto, and subject to the rights of SHELDON L. FOREMAN and ANN FANT FOREMAN and SHELDON L. FOREMAN and ANN FANT FOREMAN own said deed of trust and the note secured thereby.

32. Defendants, and each of them, claim some right, title and/or interest in and to said real property, said trust

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($232,000.00), together with interest thereon from August 25, 1987 at 12% per year. Other plaintiffs have been damaged in the sum of One Hundred Thousand Dollars ($100,000.00).

40. By reason of the foregoing, plaintiffs hold equitable title to said real property and to said second trust deed and defendants, and each of them, hold bare legal title subject to the equitable rights of plaintiffs so aforesaid. That SHELDON L. FOREMAN and ANN FANT FOREMAN have vendor's lien in said real property.

41. By reason of the foregoing, defendants hold such property subject to a trust in favor of plaintiffs.

WHEREFORE, plaintiffs pray judgment:

(1) Quieting title to the real property described in the Complaint and determining that the defendants have no right, title or interest therein and

barring them forever from making any claim to any right, title or interest therein, for decree determining that the documents which were recorded, which are described in the Complaint and were recorded, except for the deed from the PEDERSENS to HENIG, were and are valid documents and were not forged.

(2) Declaring that the deed from the PEDERSENS to HENIG conveyed no right, title or interest in and to said real property and determining and declaring the rights of the parties hereto under the documents and agreements referred to and/or alleged in this Complaint.

(3) Determining that defendants hold title only as trustee for BFP or RUSSELL BARTON subject to the trust deed for the benefit of SHELDON L. FOREMAN and ANN FANT FOREMAN, and must convey to them.

(4) That SHELDON L. FOREMAN and ANN

FANT FOREMAN have and recover Two Hundred Thirty-Two Thousand Dollars ($232,000.00) as damages, together with interest thereon at 10% from August 25, 1987, from defendants, and each of them, and if plaintiffs do not have such judgment or the real property.

(5) That the other plaintiffs recover the sum of $100,000.00 from defendants, and each of them;

(6) For costs of suit incurred herein;

(7) For attorneys fees; and

(8) For such other relief as the Court may deem just.

Dated: August 13, 1989.

WOOLSEY, ANGELO & THATCHER

BY /s/ Roy B. Woolsey

ROY B. WOOLSEY

Attorney for Plaintiffs

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husband and wife as joint tenants, herein called BENEFICIARY.

WITNESSETH: THAT TRUSTOR IRREVOCABLY GRANTS, TRANSFERS AND ASSIGNS TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in City of Newport Beach, Orange County, California described as:

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

THIS DEED IS JUNIOR AND SECOND TO AN

EXISTING FIRST TRUST DEED OF RECORD.

* * *

For the purpose of securing: 1. Performance of each agreement of trustor incorporated by reference or contained herein. 2.

Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extension of renewal thereof in the principal sum of $200,000.00 executed by Trustor in favor of Beneficiary or order.

* * *

Signature of Trustor

B.F.P., a General Partnership

By: /s/ Russell J. Barton

[ACKNOWLEDGMENT NOT REPRODUCED]

EXHIBIT "B" TO EXHIBIT 2 TO EXHIBIT "B"

TO MOTION TO DISMISS)

87-554265
RECORDED IN OFFICIAL RECORDS

OF ORANGE COUNTY, CALIFORNIA

OCTOBER 1987

Lee A. Branch, County Recorder

RECORDING REQUESTED BY WAYNE L. PEDERSEN, MARLENE M. PEDERSEN

WHEN RECORDED MAIL TO OFF-ROAD VEHICLES - RECREATION & FAMILY CAMPGROUND, INC., a California corporation, P. O. BOX 4217

LA MESA, CALIFORNIA 92044

INDIVIDUAL GRANT DEED

The undersigned grantor(s) declare(s)

Documentary transfer tax is $330.00

( ) computed on full value of property conveyed, or

(x) computed on full value less value of liens and encumbrances remaining at time of sale.

( ) unincorporated area

(x) City of NEWPORT BEACH

FOR A VALUABLE CONSIDERATION, receipt of

which is hereby acknowledged,
WAYNE L. PEDERSEN AND MARLENE M. PEDERSEN, Husband and Wife, as Joint Tenants
hereby GRANT(S) TO OFF-ROAD VEHICLES -- RECREATION & FAMILY CAMPGROUND, INC., A CALIFORNIA CORPORATION,
the following described real property in the County of ORANGE, State of California:
Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official

Records.
THE STREET ADDRESS OF THE PROPERTY DESCRIBED ABOVE IS COMMONLY KNOWN AS 225 VIA GENOA AVENUE -- LIDO ISLE -- NEWPORT BEACH, CALIF. 92663
DATED: SEPTEMBER 29, 1987

/s/Wayne L. Pedersen
WAYNE L. PEDERSEN
/s/Marlene M. Pedersen
MARLENE M. PEDERSEN

[Acknowledgment omitted in reproduction]

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executed by WAYNE L. PEDERSEN AND MARLENE PEDERSEN, husband and wife as Joint Tenants as Trustor, WILL SELL AT PUBLIC AUCTION TO HIGHEST BIDDER FOR CASH (payable at the time of sale in lawful money of the United States) at
THE NORTH FRONT ENTRANCE TO THE COUNTY COURTHOUSE, 700 CIVIC CENTER DRIVE WEST, SANTA ANA, CA
all right, title and interest conveyed to and now held by it under said Deed of Trust in the property situated in said County and State described as:
LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF
The street address and other common designation, if any, of the real property described above is purported to be:
225 VIA GENOA, NEWPORT BEACH, CALIFORNIA 92663

The undersigned Trustee disclaims any liability for any incorrectness of

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of Default and Demand for Sale, and a written Notice of Default and Election to Sell. The undersigned caused said Notice of Default and Election to Sell to be recorded in the county where the property is located.

DATE: 28 NOV 88

MORTGAGE FORECLOSURE SERVICES, INC., TRUSTEE, BY SPECIALIZED, INC., AS AGENT FOR SAID TRUSTEE
3040 STATE STREET
SANTA BARBARA, CA 93105
(805)687-8108
BY: /s/ Julie A. Lindman
JULIE A. LINDMAN,
TRUSTEE SALES OFFICER

Legal Description

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36

inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

THE STREET ADDRESS OF THE PROPERTY DESCRIBED ABOVE IS COMMONLY KNOWN AS 225 VIA GENOA AVENUE -- LIDO ISLE -- NEWPORT BEACH, CALIF. 92663

EXHIBIT "3" TO DECLARATION OF EZER IN SUPPORT OF MOTION FOR RELIEF ETC.

(PART OF EXHIBIT B TO MOTION TO DISMISS)

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

SHELDON L. FOREMAN, et al.,	CASE NO. 600205
Plaintiffs,	NOTICE OF HEARING OF DEMURRER TO COMPLAINT
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al.,	Date: 10-27-89 Time: 9:30 a.m. Dept: 23
Defendants.	

TO PLAINTIFFS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on October 27, 1989, at 9:30 a.m., or as soon thereafter as the matter can be heard, in the Courtroom of Department 23 of the above-entitled Court, located in the County Courthouse, 700 Civic Center Drive West, Santa Ana, California, defendants Paul Osborne, William Little, Dennis Roy,

Arthur Ritz, Jose Cruz, and Richard Marcy will bring on for hearing their appended Demurrer to Complaint.

Dated: September 15, 1989

RICH & EZER

By: /s/ Mitchel J. Ezer

Attorneys for Defendants

* * *

DEMURRER TO COMPLAINT

COMES NOW, defendants Robert Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz and Richard Marcy, and demur to the first, second and third alleged causes of action contained in plaintiffs' Complaint on file herein on grounds that neither the first, second nor third alleged causes of action state facts sufficient to constitute a cause of action against these demurring defendant.

WHEREFORE, these demurring defendants pray that this Demurrer be sustained without leave to amend; for their costs

of suit herein incurred; and for such other and further relief as the Court deems just.

Dated: September 15, 1989

RICH & EZER

By: /s/ Mitchel J. Ezer

Attorneys for Defendants

* * *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT

This Memorandum of Points and Authorities is submitted on behalf of defendants Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz, and Richard Marcy (hereinafter collectively called the "Movants") in support of both their Demurrer to Complaint[1] and their Motion to Expunge Lis Pendens.[2]

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1. The statutory basis for which is C.C.P. 430.10(e)

2. The statutory basis for which is C.C.P. 409.1

I.

INTRODUCTION

At the core of this controversy is the real property (the "Property") commonly known as 225 Via Genoa Avenue, Lido Isle, Newport Beach, California. In the Complaint, a series of complex transactions between the plaintiffs involving the Property is alleged, amidst which are interspersed allegations relating to the due execution of a $356,250.00 first deed of trust (the "First Trust Deed") encumbering the Property, which is due course was assigned to defendant Imperial Savings & Loan Association (Complaint, Page 5, Lines 3-18); the recordation by Imperial Savings of a Notice of Default under the First Trust Deed (Id. paragraph 15); that, in due course, Imperial Savings gave notice of the sale, but did so improperly (Id. paragraph 18); and that Imperial Savings verbally promised not to

conduct a sale until after July 17, 1989 (Id. paragraphs 19 and 25) but in violation of that promise conducted a trustee's sale on July 12, 1989. (Id., Page 10, Lines 27-28). Then, in the only averments relating to Movants, it is first alleged that at the July 12, 1989 sale Movants purchased the Property for $433,000.00 (Id. paragraph 27); and, on information and belief, that the cash price was not paid then but at a later date. (Id. paragraph 28). It is not alleged, intimated or even hinted that Movants had any knowledge of what supposedly had transpired between plaintiffs and Imperial Savings. For a variety of reasons, therefore, the Complaint -- which seeks a quieted title, declaratory relief and to impose a constructive trust upon the Property -- does not state a cause of action <u>as against Movants.</u>

II.

ORAL CONTRACT TO CONTINUE SALE

It is settled law that a verbal agreement to continue a trustee's sale is unenforceable:

"A contract in writing may not be altered by an executory oral agreement. (Civil Code, section 1698). An agreement to postpone a valid sale of property beyond the date when said property may be sold under and according to the terms of the trust deed obviously is an agreement to alter the terms of the instrument. To hold otherwise would reduce a trust deed in any case to an unsubstantial if not a worthless security." (Emphasis added).

Karlsen v. American Savings & Loan Assn., 15 C.A.3d 112, 121, 92 Cal.Rptr. 851 (1971).

Accord, Stafford v. Clinard, 87 C.A.2d

480, 481, 197 P.2d 84 (1948).

III.

THE CONCLUSIVE PRESUMPTION

Attached hereto as Exhibit 1 and incorporated herein by reference is a copy of the recorded Trustee's Deed Upon Sale. This instrument is subject to judicial notice under Evidence Code Section 452(h), and the Court is respectfully requested to take judicial notice of it pursuant to that section and under Sections 430.30(a) and 430.70 of the Code of Civil Procedure. In pertinent part, it states:

"Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Recorder of said [Orange] County.

All requirements of law regarding the mailing of copies of notices of default and related no-

tices and the posting and publication of copies of the Notice of Sale have been complied with.

Said property was sold by said Trustee at public auction on July 12, 1989 at 10:00 a.m. at the place named in the Notice of Sale, in the county of Orange, in which the property is situated. Grantee, being the highest bidder at such sale, became the purchaser of said property and paid therefore to said Trustee the amount bid, being $433.600.00 in lawful money of the United States, or by the satisfaction, pro tanto, of the obligations then secured by said Deed of Trust." (Emphasis added)

Repeatedly, the courts have held that recitals such as these create a presumption which is indeed conclusive and preclusive of precisely the type of

attack on a trustee's sale such as plaintiffs here have launched. For example, in Pierson v. Fisher, 131 C.A.2d 208, 216, 180 P.2d 91 (1955), the court found that the provisions of the Trustee's Deed were conclusive, and refused to set aside the Trustee's Deed Upon Sale, stating:

> ". . . And concerning all of them, appellant by the instrument he executed, declared that the recitals in a deed made by his trustee that all of the duties of the trust respecting the sale had been complied with should bind him. In short, he thereby made the trustee his agent with such powers that the trustee could bind him, notwithstanding that he had not carried out the provisions of his trust. As the Supreme Court said in Mersfelder v. Spring, 139 Cal. 593, 595 [73 P. 452]: Such stipulations

'in express terms give the trustee the authority to bind his principal by the mere execution of a deed containing the precise recitals.' As against a purchaser who does not participate in or know of the failure of the trustee to perform his duties, the recital that he has been true to his trust binds the trustee's principal and such purchaser may rely upon those provisions in purchasing at the sale.

. . .

The Complaint cannot be amended to state a cause of action based upon any claimed failure of the Trustee properly to conduct the sale. and the court did not err in sustaining the demurrer without leave to amend. (Emphasis added)

Accord, Taliaferro v. Crola, 152 C.A.2d

448, 313 P.2d 136 (1957) ("The recitals of the trustee's deed are conclusive in the absence of fraud of which the purchaser at the trustee's sale had knowledge or notice"); Abrahamer v. Parks, 141 C.A.2d 82, 296 P.2d 341 (1956) ("The trustee's deed recites a default, the execution and delivery by the trustee of a written declaration of default and demand for sale, compliance with section 2924 and 2924b of the Civil Code, the giving of notice of sale by publication and by posting in three public places in Los Angeles and in a conspicuous place on each parcel of the property after not less than three months from the date of recording the notice of default, and the sale at public auction to plaintiff, the highest bidder. Defendants were precluded in this proceeding by these recitals"); Cobb v. California Bank, 6 C.2d 389, 57

P.2d 924 (1936) ("The deed of trust under which the property was sold contains the usual recital that the recitals in the trustee's deed of any matters of fact affecting the regularity or validity of the foreclosure sale shall be conclusive proof of the truthfulness thereof and that said trustee's deed shall be conclusive against all persons as to all matters of fact therein recited. . . . The appellants herein were concluded by these recitals in the trustee's deed"); Central National Bank v. Bell, 5 C.2d 324, 54 P.2d 1107 (1936) ("The trust deeds provided that, in the event o sale thereunder, the recitals in the trustee's deeds . . . should be conclusive evidence of all such facts recited. In this action and on the record before us the defendants were concluded by the recitals in the trustee's deeds");

Carpenter v. Smallpage, 200 Cal. 129, 29 P.2d 841 (1934) ("The court set forth the various steps taken to foreclose the trust deed, all of which were proven by the recitals in the trustee's deed. These recitals under the terms of the trust deed were made conclusive proof of all facts therein recited. . ."); Jose Realty Co. v. Pavlicevich, 163 Cal. 613, 130 Pac. 15 (1911) ("If the recital in the trustee's deed is conclusive on Cottle and his successors in interest, it would follow that this finding is contrary to the evidence. That such recital is conclusive, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice, appears to be settled by the decisions of this Court"); Birkhofer v. Krumm, 27 C.A.2d 513, 81 P.2d 609 (1938) ("The

trustee's deed for the property sold is in evidence and recites in detail not only that the notice was given but the manner in which it was given and that by the terms of the deed of trust such recitals are made conclusive of the facts recited"): Bechtel v. Wilson, 18 C.A.2d 331, 63 P.2d 1170 (1936) ("The recitals in the trustee's deed of due and proper posting is made conclusive evidence thereof by the deed of trust and this alone is sufficient to sustain the trial court's findings on that issue"); Johnson v. Grant, 87 Cal.App. 402, 262 Pac. 402 (1927) ("The recitals in the deed that the trustee exposed the property for sale at public auction to the highest bidder are sufficient to support the finding that the sale was fairly and legally conducted".

More recently, in Napue v. Gor-Mey West Inc., 175 C.A.3d 608, 220 Cal.Rptr.

799 (1985), the Court of Appeal considered a Los Angeles Superior Court decision to set aside a foreclosure sale. In reversing the trial court, the Court of Appeal specifically stated that:

> "In order to protect a purchaser of a property in a trustee's sale, section 294 provides that a recital in the deed executed pursuant to a power of sale that all procedural requirements have been complied with 'shall constitute prima facie evidence of compliance of such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.' Thus, any failure to comply with the procedural requirements of section 2924 will not affect the validity of the sale in favor of a bona fide purchaser. A sale to a bona fide

purchaser is not voidable." (Emphasis added.)

And in Wolfe v. Lipsy, 163 C.A.3d 633, 209 Cal.Rptr. 801 (1985), the Court of Appeal reversed a Los Angeles Superior Court which had set aside a foreclosure sale. Relying on section 2924, the Court of Appeal explained:

"Thus, Civil Code section 2924 contains two presumptions. One is rebuttable presumption here the recital in the trustee's deed upon sale is merely prima facie evidence of statutory compliance. (Evid. Code, Section 602.) The other is a conclusive presumption where the trustee's sale involves a bona fide purchaser or encumbrancer for value and without notice. 'A conclusive presumption is one that requires the trier of fact to find that the presumed fact exists from a finding

of the existence of the basic fact. The presumption is conclusive because the adverse party against whom it operates is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact.' (Citations omitted.)" (Emphasis added.)

There is, in short, a clear distinction between the binding effect of recitals on the parties, and, as here, their effect when the property has been sold to an uninvolved third-party purchaser:'

"It is claimed by appellant, however, that because such deed of trust contains the provisions that, in the event of a sale of said premises, or any part thereof, and the execution of a deed thereto under the trust, that the recitals therein of any default, payments, publication of notice of sale, demand

that such sale should be made, postponement of sale, terms of sale, purchaser, payment of purchase money, fact or facts confirming the regularly or validity of such sale, shall be conclusive proofs of such matters and of all other facts recited therein against the said first parties, defendants are estopped to claim irregularity connected with the sale. That this would be the effect as to a purchase by a third party and a conveyance to him by the trustee must be conceded." (Emphasis added)

The law was well summarized in Harker v. Rickershauser, 94 Cal.App. 755, 271 Pac. 912 (1928):

> "The theory upon which the courts have proceeded in construing recitals in trustee's deeds is that the grantor under the trust deed is

bound by the delegation of such authority as is given to the trustee in the exercise of his trust. This includes the execution of a deed pursuant to a sale, and the inclusion in said deed of such recitals as the parties may agree upon, and may include a clause relative to the conclusiveness of such recitals as to truth of the facts stated therein. Such recitals are conclusive where an innocent third party is the grantee in the trustee's deed, (Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 P. 15), but they are not conclusive as between the parties of the trust deed. Secccombe v. Roe, 22 Cal. App. 139, 133 P. 507)." (Emphasis added)

Manifestly, then, plaintiffs are precluded by the recitals in the Trus-

tee's Deed from now alleging that Movants did not acquire good title to the Property at the foreclosure sale.

IV.

BONA FIDE PURCHASE

Not only does the Trustee's Deed (Exhibit 1) contain the recitals upon which the conclusive presumption is based, it also by itself, in the absence of any factual allegations by plaintiffs to the contrary (and they are totally and completely absent), establishes that Movants as a matter of law are bona fide purchasers of the property.

To qualify as a bona fide purchaser, one does not have to be a candidate for sainthood or possess the moral rectitude of a Chasidic Rabbi. In law, a "bona fide purchaser is one who has purchased property for value without notice of any defects in the title of the seller." Walters v. Calderon, 25 C.A.3d 863, 876,

102 Cal.Rptr. 89 (1972). Value in this context means legal consideration, not full market value. "In dealing with the question of testing the status of a person as a bona fide purchaser, the question is one of legal consideration necessary to sustain an action for damages rather than the amount of consideration required in an equitable action for specific performance. . . . Ordinarily a court will not weigh the sufficiency of the consideration once it is found to be of some value. Generally some value means any value whatever, even that of a peppercorn, tomtit or one dollar in hand." Walters v. Calderon, supra. Since Movants paid $433,600.00 cash for the Property, there can no be question but that "value" was paid.

The foreclosure sale buyer without notice is protected as a bona fide purchaser. See Karrell v. First Thrift of

Los Angeles, 104 C.A.2d 536, 232 P.2d 1 (1951):

"Was Kessler a bona fide purchaser for value without notice?

Yes. There is no evidence in the record to indicate that defendant Kessler had any knowledge of the agreement or transactions between plaintiff and First Thrift or plaintiff and Great Western. Therefore, he was a bona fide purchaser for value without notice and as such was not chargeable with the fraud of his predecessor and took a title purged of any anterior fraud affecting it and free of any equities existing between the original parties."

Accord, Lancaster Security Investment Corp. v. Kessler, 159 C.A.2d 649, 324 P.2d 634 (1958); Strutt v. Ontario Savings & Loan Assn., 11 C.A.3d 547, 90

Cal.Rptr. 69 (1979). See also 1 Miller & Starr, Current Law of California Real Estate, Part I, pp. 543-44 (Rev. ed. 1975):

"A third person who buys at the foreclosure sale is a bona fide purchaser for value, and he takes the title free and clear of any unknown defects or defenses to his title."

V.

DECLARATORY RELIEF

Plaintiffs have included a declaratory relief count (the second cause of action) in their Complaint in the apparent belief that it will somehow avoid the effect of a demurrer. Not so. Declaratory relief is as vulnerable to demurrer as any other cause of action when, as here, it appears that the underlying claims have already crystallized, and do not require adjudication of rights to arise

in the future. In Travers v. Louden, 254 C.A.2d 926, 62 Cal.Rptr. 654 (1967), the rule was stated as follows:

> "There is unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.
>
> * * *
>
> The courts should not temporize with the improper use of the declaratory procedure . . . Undeserving cases should be disposed of in a summary manner, as upon demurrer."

In Silver v. City of Los Angeles, 217 C.A.2d 134, 31 Cal.Rptr. 545 (1963), a demurrer to a declaratory relief suit was sustained without leave to amend and affirmed on appeal, the Court noting:

> "Where plaintiff makes no case on the merits and a declaratory relief action would merely produce a useless trial, a dismissal is proper."

Similarly, in Igna v. City of Baldwin Park, 9 C.A.3d 909, 915, 88 Cal.Rptr. 581 (1970), where a demurrer to a declaratory relief complaint was sustained without leave to amend, it was held:

> "When it is clearly indicated that plaintiff would be unable to amend to state a cause of action, it is proper for the court to sustain the demurrer without leave to amend. Leave to amend is appropriately withheld where it is clear

that plaintiff is seeking the legally impossible."

Accord, Konecko v. Konecko, 164 C.A.2d 249, 330 P.2d 393 (1958); California State Employees Assn. v. Fluornoy, 32 C.A.3d 219, 240-41, 108 Cal.Rptr. 251 (1973), Jackson v. Teachers Ins. Co., 30 C.A.3d 341, 343-44, 106 Cal.Rptr. 208 (1973); Stribling v. Maillard, 6 C.A.3d 470, 475, 85 Cal.Rptr. 92 (1970); Wilson v. Civil Service Commission, 224 C.A.2d 340, 344, 36 Cal.Rptr. 559 (1968); Jefferson v. City of Los Angeles, 266 C.A.2d 300, 303, 72 Cal.Rptr. 85 (1968).

CONCLUSION

The Complaint manifestly does not state a cause of action against Movants. Whether leave to amend is granted or not should, it is submitted, depend upon whether plaintiffs' counsel can represent to the Court that he can truthfully allege additional facts (which he cannot,

since none exist) that will overcome the points raised by the Demurrer. Whether leave to amend is granted or not, however, the motion to expunge the lis pendens should either be granted at this time -- since the lis pendens was recorded by plaintiffs deliberately to befoul a pending sale of the Property by Movants to a third-party -- or, pursuant to C.C.P. 409.1(b), plaintiffs should be required to post a $725,000 bond ($725,000 being the property value alleged by plaintiffs; Complaint, Page 10, Lines 18-19) as a condition of denying expungement.

Dated: September , 1989

Respectfully submitted,

RICH & EZER

Attorneys for Defendants PAUL OSBORNE, WILLIAM LITTLE DENNIS ROY, ARTHUR RITZ, JOSE CRUZ, and RICHARD MARCY

EXHIBIT "4" TO DECLARATION OF EZER

IN SUPPORT OF MOTION FOR RELIEF, ETC.

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

SHELDON L. FOREMAN, et al.,	CASE NO. 600205
Plaintiffs,	NOTICE OF MOTION FOR ORDER EXPUNGING LIS PENDENS
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al.,	Date: 10-27-89 Time: 9:30 a.m. Dept: 23
Defendants.	

TO PLAINTIFFS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on October 27, 1989, at 9:30 a.m., or as soon thereafter as the matter can be heard, in the Courtroom of Department 23 of the above-entitled Court, located in the County Courthouse, 700 Civic Center Drive West, Santa Ana, California, defendants Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz, and Richard Marcy

will move this Court for its order expunging that certain 'Notice of Lis Pendens" recorded in the Orange County Records on or about August 18, 1989 in connection with the above entitled action.

Said motion will be made on the grounds that at the time of recordation of said Lis Pendens the plaintiffs had no title or claim of title as against Movants to the real property which is the subject of this action.

Said motion will be based on this Notice of Motion, on the Declaration of William Little, on the separate Memorandum of Points and Authorities supporting both this motion and the Demurrer to Complaint being filed concurrently herewith, and upon all of the pleadings, records and files in this action.

Dated: September 15, 1989

RICH & EZER * * *

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF MOTION FOR ORDER

EXPUNGING LIS PENDENS

This Memorandum of Points and Authorities is submitted on behalf of defendants Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz, and Richard Marcy (hereinafter collectively called the "Movants") in support of both their Demurrer to Complaint[1] and their Motion to Expunge Lis Pendens.[2]

I.

INTRODUCTION

At the core of this controversy is the real property (the "Property") commonly known as 225 Via Genoa Avenue, Lido Isle, Newport Beach, California. In the Complaint, a series of complex transac-

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1. The statutory basis for which is C.C.P. 430.10(e)

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sale Movants purchased the Property for $433,000,00 (Id. Paragraph 27); and, on information and belief, that the cash price was not paid then but at a later date. (Id. Paragaph 28). It is not alleged, intimated or even hinted that Movants had any knowledge of what supposedly had transpired between plaintiffs and Imperial Savings. For a variety of reasons, therefore, the Complaint -- which seeks a quieted title, declaratory relief and to impose a constructive trust upon the Property -- does not state a cause of action as against Movants.

II.

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"A contract in writing may not be altered by an executory oral agreement. (Civil Code, section

1698). An agreement to postpone a valid sale of property beyond the date when said property may be sold under and according to the terms of the trust deed obviously is an agreement to alter the terms of the instrument. To hold otherwise would reduce a trust deed in any case to an unsubstantial if not a worthless security." (Emphasis added).

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Accord, Stafford v. Clinard, 87 C.A.2d 480, 481, 197 P.2d 84 (1948).

III.

THE CONCLUSIVE PRESUMPTION

Attached hereto as Exhibit 1 and incorporated herein by reference is a copy of the recorded Trustee's Deed Upon Sale. This instrument is subject to judicial notice under Evidence Code

Section 452(h), and the Court is respectfully requested to take judicial notice of it pursuant to that section and under Sections 430.30(a) and 430.70 of the Code of Civil Procedure. In pertinent part, it states:

"Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Recorder of said [Orange] County.

All requirements of law regarding the mailing of copies of notices of default and related notices and the posting and publication of copies of the Notice of Sale have been complied with.

Said property was sold by said Trustee at public auction on July 12, 1989 at 10:00 a.m. at the place named in the Notice of Sale, in the County of Orange, in which the

property is situated. Grantee, being the highest bidder at such sale, became the purchaser of said property and paid therefore to said Trustee the amount bid. being $433,600.00 in lawful money of the United States, or by the satisfaction, pro tanto, of the obligations then secured by said Deed of Trust." (Emphasis added)

Repeatedly, the courts have held that recitals such as these create a presumption which is indeed conclusive and preclusive of precisely the type of attack on a trustee's sale such as plaintiffs here have launched. For example, in Pierson v. Fisher, 131 C.A.2d 208, 216, 180 P.2d 91 (1955), the court found that the provisions of the Trustee's Deed were conclusive, and refused to set aside the Trustee's Deed Upon Sale, stating:

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them, appellant by the instrument he executed, declared that the recitals in a deed made by his trustee that all of the duties of the trust respecting the sale had been complied with should bind him. In short, he thereby made the trustee his agent with such powers that the trustee could bind him, notwithstanding that he had not carried out the provisions of his trust. As the Supreme Court said in Mersfelder v. Spring, 139 Cal. 593, 595 t73 P. 452]: Such stipulations 'in express terms give the trustee the authority to bind his principal by the mere execution of a deed containing the precise recitals.' As against a purchaser who does not participate in or know of the failure of the trustee to perform his duties, the recital that he has

been true to his trust binds the trustee's principal and such purchaser may rely upon those provisions in purchasing at the sale.

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The Complaint cannot be amended to state cause of action based upon any claimed failure of the trustee properly to conduct the sale, and the court did not err in sustaining the demurrer without leave to amend. (Emphasis added)

Accord, Taliaferro v. Crola 152 C.A.2d 448, 313 P.2d 136 (1957) ("The recitals of the trustee's deed are conclusive in the absence of fraud of which the purchaser at the trustee's sale had knowledge or notice); Abrahamer v. Parks, 141 C.A.2d 82, 296 P.2d 341 (1956) ("The trustee's deed recites a default, the execution and delivery by the trustee of a written declaration of default and

demand for sale, compliance with section 2924 and 2924b of the Civil Code, the giving of notice of sale by publication and by posting in three public places in Los Angeles and in a conspicuous place on each parcel of the property after not less than three months from the date of recording the notice of default, and the sale at public auction to plaintiff, the highest bidder. Defendants were precluded in this proceeding by these recitals"); Cobb v. California Bank, 6 C.2d 389, 57 P.2d 924 (1936) ("The deed of trust under which the property was sold contains the usual recital that the recitals in the trustee's deed of any matters of fact affecting the regularity or validity of the foreclosure sale shall be conclusive proof of the truthfulness thereof and that said trustee's deed shall be conclusive against all persons as to all matters of fact therein recited. . . . The

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successors in interest, it would follow that this finding is contrary to the evidence. That such recital is conclusive, where the deed of trust empowers the trustee to make it, in the absence of fraud of which the purchaser at the trustee's sale had notice, appears to be settled by the decisions of this Court"); Birkhofer v. Krumm, 27 C.A.2d 513, 81 P.2d 609 (1938) ("The trustee's deed for the property sold is in evidence and recites in detail not only that the notice was given but the manner in which it was given and that by the terms of the deed of trust such recitals are made conclusive of the facts recited"); Bechtel v. Wilson, 18 C.A.2d 331, 63 P.2d 1170 (1936) (The recitals in the trustee's deed of due and proper posting is made conclusive evidence thereof by the deed of trust and this alone is sufficient to sustain the trial court's find-

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> "In order to protect a purchaser of a property in a trustee's sale, section 294 provides that a recital in the deed executed pursuant to a power of sale that all procedural requirements have been complied with 'shall constitute prima facie evidence of compliance of such

requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.' Thus, any failure to comply with the procedural requirements of section 2924 will not affect the validity of the sale in favor of a bona fide purchaser. A sale to a bona fide purchaser is not voidable." (Emphasis added.)

And in Wolfe v. Lipsy, 163 C.A.3d 633, 209 Cal.Rptr. 801 (1985), the Court of Appeal reversed a Los Angeles Superior Court which had set aside a foreclosure sale. Relying on section 2924, the Court of Appeal explained:

> "Thus, Civil Code section 2924 contains two presumptions. One is a rebuttable presumption where the recital in the trustees deed upon sale is merely prima facie evidence

of statutory compliance. (Evid. Code, Section 602.) The other is a conclusive presumption where the trustee's sale involves a bona fide purchaser or encumbrancer for value and without notice. 'A conclusive presumption is one that requires the trier of fact to find that the presumed fact exists from a finding of the existence of the basic fact. The presumption is conclusive because the adverse party against whom it operates is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact.' (Citations omitted.)" (Emphasis added.)

There is, in short, a clear distinction between the binding effect of recitals on the parties, and, as here, their effect when the property has been sold to an uninvolved third-party purchaser:

"It is claimed by appellant, however, that because such deed of trust contains the provisions that, in the event of a sale of said premises, or any part thereof, and the execution of a deed thereto under the trust, that the recitals therein of any default, payments, publication of notice of sale, demand that such sale should be made, postponement of sale, terms of sale, purchaser, payment of purchase money, fact or facts confirming the regularity or validity of such sale, shall be conclusive proofs of such matters and of all other facts recited therein against the said first parties, defendants are estopped to claim irregularity connected with the sale. That this would be the effect as to a purchase by a third party and a convey-

ance to him by the trustee must be conceded." Emphasis added)

The law was well summarized in Harker v. Rickershauser, 94 Cal.App. 755, 271 Pac. 912 (1928):

"The theory upon which the courts have proceeded in construing recitals in trustee's deeds is that the grantor under the trust deed is bound by the delegation of such authority as is given to the trustee in the exercise of his trust. This includes the execution of a deed pursuant to a sale, and the inclusion in said deed of such recitals as the parties may agree upon, and may include a clause relative to the conclusiveness of such recitals as to truth of the facts stated therein. Such recitals are conclusive where an innocent third part is the grantee in the

trustees deed, (Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 P. 15), but they are not conclusive as between the parties of the trust deed.

Secccombe v. Roe, 22 Cal. App. 139, 133 P. 507)." (Emphasis added)

Manifestly, then, plaintiffs are precluded by the recitals in the Trustee's Deed from now alleging that Movants did not acquire good title to the Property at the foreclosure sale.

IV.

BONA FIDE PURCHASE

Not only does the Trustee's Deed (Exhibit 1) contain the recitals upon which the conclusive presumption is based, it also by itself, in the absence of any factual allegations by plaintiffs to the contrary (and they are totally and completely absent), establishes that Movants as a matter of law are bona fide

purchasers of the property.

To qualify as a bona fide purchaser, one does not have to be a candidate for sainthood or possess the moral rectitude of a Chasidic Rabbi. In law, a "bona fide purchaser is one who has purchased property for value without notice of any defects in the title of the seller." Walters v. Calderon, 25 C.A.3d 863, 876, 102 Cal.Rptr. 89 (1972). Value in this context means legal consideration, not full market value. "In dealing with the question of testing the status of a person as a bona fide purchaser, the question is one of legal consideration necessary to sustain an action for damages rather than the amount of consideration required in an equitable action for specific performance. . . . Ordinarily a court will not weigh the sufficiency of the consideration once it is found to be of some value. Generally some value means

any value whatever, even that of a peppercorn, tomtit or one dollar in hand." Walters v. Calderon, supra. Since Movants paid $433,600.00 cash for the Property, there can no be question but that "value" was paid.

The foreclosure sale buyer without notice is protected as a bona fide purchaser. See Karrell v. First Thrift of Los Angeles, 104 C.A.2d 536, 232 P.2d 1 (1951):

"Was Kessler a bona fide purchaser for value without notice?

Yes. There is no evidence in the record to indicate that defendant Kessler had any knowledge of the agreement or transactions between plaintiff and First Thrift or plaintiff and Great Western. Therefore, he was a bona fide purchaser for value without notice and as such was not charge-

able with the fraud of his predecessor and took a title purged of any anterior fraud affecting it and free of any equities existing between the original parties."

Accord, Lancaster Security Investment Corp. v. Kessler, 159 C.A.2d 649, 324 P.2d 634 (1958); Strutt v. Ontario Savings & Loan Assn., 11 C.A.3d 547, 90 Cal.Rptr. 69 (1979). See also 1 Miller & Starr, Current Law of California Real Estate, Part I, pp. 543-44 (Rev. ed. 1975):

"A third person who buys at the foreclosure sale is a bona fide purchaser for value, and he takes the title free and clear of any unknown defects or defenses to his title."

V.

DECLARATORY RELIEF

Plaintiffs have included a declara-

tory relief count (the second cause of action) in their Complaint in the apparent belief that it will somehow avoid the effect of a demurrer. Not so. Declaratory relief is as vulnerable to demurrer as any other cause of action when, as here, it appears that the underlying claims have already crystallized, and do not require adjudication of rights to arise in the future. In Travers v. Louden, 254 C.A.2d 926, 62 Cal.Rptr. 654 (1967), the rule was stated as follows:

> "There is unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preven-

> tive justice, to declare rights rather than execute them.
>
> * * *
>
> The courts should not temporize with the improper use of the declaratory procedure . . . Undeserving cases should be disposed of in a summary manner, as upon demurrer."

In Silver v. City of Los Angeles, 217 C.A.2d 134, 31 Cal.Rptr. 545 (1963), a demurrer to a declaratory relief suit was sustained without leave to amend and affirmed on appeal, the Court noting:

> "Where plaintiff makes no case on the merits and a declaratory relief action would merely produce a useless trial, a dismissal is proper."

Similarly, in Igna v. City of Baldwin Park, 9 C.A.3d 909, 915, 88 Cal.Rptr. 581 (1970), where a demurrer to a declaratory

relief complaint was sustained without leave to amend, it was held:

> "When it is clearly indicated that plaintiff would be unable to amend to state a cause of action, it is proper for the court to sustain the demurrer without leave to amend. Leave to amend is appropriately withheld where it is clear that plaintiff is seeking the legally impossible."

Accord, Konecko v. Konecko, 164 C.A.2d 249, 330 P.2d 393 (1958); California State Employees Assn. v. Fluornoy, 32 C.A.3d 219, 240-41, 108 Cal.Rptr. 251 (1973), Jackson v. Teachers Ins. Co., 30 C.A.3d 341, 343-44, 106 Cal.Rptr. 208 (1973); Stribling v. Maillard, 6 C.A.3d 470, 475, 85 Cal.Rptr. 92 (1970); Wilson v. Civil Service Commission, 224 C.A.2d 340, 344, 36 Cal.Rptr. 559 (1968); Jefferson v. City of Los Angeles, 266 C.A.2d 300, 303, 72 Cal.Rptr. 85 (1968).

CONCLUSION

The Complaint manifestly does not state a cause of action against Movants. Whether leave to amend is granted or not should, it is submitted, depend upon whether plaintiffs' counsel can represent to the Court that he can truthfully allege additional facts (which he cannot, since none exist) that will overcome the points raised by the Demurrer. Whether leave to amend is granted or not, however, the motion to expunge the lis pendens should either be granted at this time -- since the lis pendens was recorded by plaintiffs deliberately to befoul a pending sale of the Property by Movants to a third-party -- or, pursuant to C.C.P. 409.1(b), plaintiffs should be required to post a $725,000 bond

($725,000 being the property value alleged by plaintiffs; Complaint, Page 10, Lines 18-19) as a condition of denying expungement.

Dated: September , 1989

Respectfully submitted,

RICH & EZER

By: /s/MITCHEL J. EZER

Attorneys for Defendants

EXHIBIT "5" TO DECLARATION OF EZER IN SUPPORT OF MOTION FOR RELIEF ETC.

FILED

JUN 15, 1989

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Bk. No. SA 88-07521 JR
BFP PARTNERSHIP,	Ref. No. M9-0171 JR
Debtor.	Chapter 11
IMPERIAL SAVINGS ASSOCIATION, its assignees and/or successors in interest,	JUDGMENT AND ORDER VACATING AUTOMATIC STAY
Movant,	Hearing -
vs.	Date: June 12, 1989
	Time: 9:30 a.m.
BFP PARTNERSHIP,	Place: United States Bankruptcy Court
	34 Civic Center
	Santa Ana, CA
	Courtroom 520
Respondent.	

ls2

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Automatic Stay in the above-entitled bankruptcy proceeding be immediately vacated and extinguished as to Movant, its assignees and/or successors in interest, and Movant, its assignees and/or successors in interest may proceed with foreclosure of and hold a Trustee's Sale of the subject Property generally known as 225 Via Genoa, Newport Beach, California and legally described as follows:

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the

City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records,

according to California Civil Code 2924 et seq., and thereafter commence any action necessary to obtain complete possession of the subject Property.

Dated: June 14, 1989

/s/ JOHN RYAN

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "6" TO DECLARATION OF EZER IN SUPPORT OF MOTION FOR RELIEF ETC.

WHEN RECORDED MAIL TO: PAUL OSBORNE, 16 GREENWOOD, IRVINE, CA 92714

MAIL TAX STATEMENTS TO: SAME AS ABOVE

FHA/VA/PMI

LOAN NO. 8032005706

T.S. NO. 88-08617

TRUSTEE'S DEED UPON SALE

The undersigned grantor declares:

(1) The grantee herein was not the foreclosing beneficiary.

(2) The amount of the unpaid debt together with costs was $421,815.72.

(3) The amount paid by the grantee at the trustee sale was $433,600.00.

(4) The documentary transfer tax is $477.40.

(5) Said property is in the City of NEWPORT BEACH, and

MORTGAGE FORECLOSURE SERVICES, INC., (herein called Trustee), as the duly appointed Trustee under the Deed of Trust hereinafter described does hereby grant

and convey, but without warranty, express or implied, to

WILLIAM LITTLE, A SINGLE MAN, AS TO AN UNDIVIDED 2/5 INTEREST, DENNIS ROY, AS TO AN UNDIVIDED 1/10 INTEREST, ARTHUR RITZ, AS TO AN UNDIVIDED 1/10 INTEREST, PAUL OSBORNE, AS TO AN UNDIVIDED 1/10 INTEREST, JOSE J. CRUZ, AS TO AN UNDIVIDED 1/10 INTEREST, RICHARD MARCZ, AS TO AN UNDIVIDED 1/5 INTEREST, AS TENANTS IN COMMON

(herein called Grantee), all of its right, title and interest in and to that certain property situated in the City of NEWPORT BEACH, County of ORANGE, State of CALIFORNIA, as described as follows:

LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF

TRUSTEE STATES THAT:

This conveyance is made pursuant to the powers conferred upon Trustee by that certain Deed of Trust dated 8-04-87, and

executed by WAYNE L. PEDERSEN AND MARLENE PEDERSEN, husband and wife as Joint Tenants,

as trustor, and recorded 8-25-87 as instrument no. 87-481935 of Official Records of ORANGE County, State of California, and after fulfillment of the conditions specified in said Deed of Trust authorizing this conveyance.

Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Recorder of said County.

All requirements of law regarding the mailing of copies of notices of default and related notices and the posting and publication of copies of the Notice of Sale have been complied with.

Said property was sold by said Trustee as public auction on July 12, 1989 at 10:00 A.M. at the place named in the Notice of Sale, in the County of ORANGE, in which

the property is situated. Grantee, being the highest bidder at such sale, became the purchaser of said property and paid therefore to said Trustee the amount bid, being $433,600.00 in lawful money of the United States, or by the satisfaction, pro tanto, of the obligations then secured by said Deed of Trust.

IN WITNESS WHEREOF, said Specialized, Inc., as agent for the Trustee, has this day caused its corporate name and seal to be hereunto affixed by its Vice President and, thereunto duly authorized by resolution of its Board of Directors.

MORTGAGE FORECLOSURE SERVICES, INC.

(Trustee)

By: Specialized, Inc., Agent

By: /s/ Mary McPheelers

Mary McPheelers, VICE PRESIDENT

[Acknowledgment omitted in reproduction]

[Attachment to TRUSTEE'S DEED UPON SALE]

Lots 946 and 947 of Tract No. 907, in the City of Newport Beach, County of Orange, State of California, as shown on a map recorded in Book 28, pages 25 to 36 inclusive, of Miscellaneous Maps, in the office of the County Recorder of said County together with the Northwesterly 17 feet of that portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953 in Book 2518, Page 348, Official Records.

EXHIBIT "7" (WITHOUT EXHIBITS) TO

DECLARATION OF EZER IN

SUPPORT OF MOTION FOR RELIEF ETC.

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

SHELDON I FOREMAN, et al., Plaintiffs,	No. 600205
vs.	DECLARATION OF DEFENDANT DENNIS ROY IN SUPPORT OF MOTION FOR ORDER EXPUNGING LIS PENDENS
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al., Defendants.	

* * *

I, the undersigned, say:

I am one of the defendants in this action, and make this Declaration in support of the motion of myself and my co-defendants Paul Osborne, William Little, Arthur Ritz, Jose Cruz and Richard Marcy (hereinafter, collectively, "we" or "us")

for expungement of the lis pendens recorded by plaintiffs on or about August 18, 1989.

This is the second lawsuit filed by plaintiffs against us. On or about July 17, 1989, plaintiffs filed Orange County Superior Court Case No. 596890 in which, as in the present case, they attacked the validity of the July 12, 1989 trustee's sale at which we purchased the subject property (225 Via Genoa, Lido Isle, Newport Beach; hereinafter the "Property").[1] Plaintiffs, as they have done here, also recorded a lis pendens in connection with the prior action (copy

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1.A copy of the Complaint in that action, which the Court is respectfully requested to notice judicially pursuant to Evidence Code Sec. 452(d), is attached hereto as Exhibit 1. The Court is also requested to take judicial notice of Exhibits 2 and 3 attached hereto, a description of which follows hereinafter, as both are also subject to judicial notice under Evidence Code Sections 452(d) and (h).

attached as Exhibit 2).

After the Prior Action was filed, I spoke with plaintiffs counsel, Roy B. Woolsey ("Woolsey") on two occasions. During our first conversation, I told Mr. Woolsey that I am an attorney although in this instance I was acting for my co-purchasers and I as a principal; that my co-purchasers and I knew absolutely nothing about the matters alleged in the Prior Action Complaint; that we had attended a noticed public auction of real estate and outbid everyone else present for the Property; that the action as against us was entirely without merit; and that we wanted it withdrawn. Mr. Woolsey said he would look into the matter further, and get back to me. He did so. A few days later, Mr. Woolsey called me and apologized. He said, in substance, that when the Prior Action was filed he and his clients were convinced

that my co-purchasers and I were "in cahoots" with Imperial Savings; that he had since delved deeper into the matter and found that there was absolutely nothing wrong with the trustee's sale; that his client, Sheldon Foreman, who had been "following the sale" with the intention of buying the Property at the sale, had gone on vacation, "lock track" of the sale date, and simply missed the sale; and that he would dismiss the suit, withdraw the lis pendens and have his client surrender possession of the Property to us if we in turn would agree not to sue him and his client, to which I agreed.

Initially, Mr. Woolsey was as good as his word. He dismissed the Prior Action (albeit without prejudice); withdrew the lis pendens (a copy of the withdrawal is attached has Exhibit 3); and, most important, actually caused his

client Mr. Foreman, to surrender possession of the Property to us. Mr. Foreman, in other words, actually vacated the Property voluntarily. It was my impression that Mr. Woolsey and I had settled the case. We are both attorneys, and my experience has been that when counsel agree verbally to a settlement, and the settlement is implemented, that even if it is not documented the matter is settled. Mr. Woolsey, however, apparently has a different view of the matter.

Based upon what I thought was an agreed settlement -- implemented not only by the dismissal of the Prior Action and the withdrawal of the lis pendens, but by the voluntary surrender of possession of the Property by Mr. Foreman to us--my co-purchasers and I entered into an escrow for the resale of the Property. (a copy of the escrow instructions is attached as Exhibit 4). The filing of the present

case -- which is as meritless as the Prior Action -- therefore came not only as a complete shock but has placed my co-purchasers and I in a totally untenable position through no fault of our own. Relying upon Mr. Woolsey's word and the actions of both Mr. Woolsey and his client, Mr. Foreman, we entered into the resale escrow in good faith, but because of the filing of this action and the recordation of the Lis Pendens in connection with it, we cannot now close escrow. The purchaser is threatening suit. We want to perform, but can do so only by having the lis pendens recorded in connection with this action (Ex. 5) expunged. Since this lawsuit, as against my co-purchasers and myself, it utterly meritless -- a fact already conceded by Messrs. Woolsey and Foreman in connection with the Prior Action -- it is urged that the requested expungement be ordered.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 1989 at Santa Ana, California.

/s/ Dennis Roy
Dennis Roy

EXHIBIT "C" TO SMENT'S DECLARATION

IN SUPPORT OF MOTION TO DISMISS ETC.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re:	Bk. No. SA 89-06771-JR
BFP, a Partner, ship,	CHAPTER 11
Plaintiffs,	SUPPLEMENTAL DECLARATION OF DENNIS ROY IN SUPPORT OF MOTION FOR FOR RELIEF
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, etc., et al.,	Hearing -- Date: 10-27-89 Time: 9:30 a.m. Dept: 23
Defendants.	

TO: HONORABLE JOHN RYAN, DEBTOR AND ITS COUNSEL:

PLEASE TAKE NOTICE that Movants hereby submit the Declaration of Dennis Roy in support of, and as a supplement to, their Motion For Relief From Automatic Stay herein.

DECLARATION OF DENNIS ROY

I, DENNIS ROY, declare and state as

follows:

1. As to the following facts, I know them to be true of my own knowledge, and if called upon to testify herein, I could and would testify competently to those facts.

2. I am one of the Movants herein. I am also an attorney duly licensed to practice before this Court and in all courts of the State of California.

3. Sometime prior to July 1989, Respondent/Debtor BFP, a Partnership ("Respondent/Debtor") and others filed a Superior Court action (different than the actions referred to in the Motion for Relief) as to the subject property in the Superior Court for the County of Orange (Case No. X-54-16-04). Neither Movants nor Imperial Savings were parties to that action. Respondent's/Debtor's present counsel, Roy Woolsey, represented Respondent/Debtor and others therein.

4. Within the past three weeks, I have reviewed the Superior Court file with respect to that action.

5. A trial was apparently held in the aforementioned action on or about July 17, 1989. On July 21, 1989, an Announcement of Tentative Decision, apparently prepared by the Superior Court judge who conducted the trial, was filed in that action. A true and correct copy thereof is attached hereto as Exhibit "8" and incorporated herein by reference. I have compared this copy with the original in the court file, and it is identical to the original.

6. The Announcement specifically states that: i) an attempted transfer of title to Respondent/Debtor was invalid (p.2); ii) the vested interest attempted to be transferred "did not pass to BFP" (p. 2); iii) title to the subject Property was quieted in favor of Sheldon L.

Foreman and Ann Fant Foreman (P. 3); and iv) the Foremans received a monetary award of $200,000.00, while Russell J. Barton received an award of $60,000.00 (p. 3).

7. On October 12, 1989, a Statement of Decision was filed in the aforementioned action. It was apparently prepared by Respondent's/Debtor's counsel. A true and correct copy thereof is attached hereto as Exhibit "9" and incorporated herein by reference. I have compared this copy with the original in the Court file, and it is identical to the original.

8. This Statement of Decision specifically states that: a transfer of title to the subject property by Sheldon Foreman and Leroy and Ann Fant Foreman to Wayne and Marlene Pedersen was rescinded (pp. 2-3, section 1); an attempted transfer of title to Respondent/Debtor was unauthorized (p. 5, section 1(a)(vi));

Respondent/Debtor was aware in July 1989 of the default owed to Imperial Savings, its foreclosure proceedings and trustee's sale (p. 6, section 1(a)(xii)); "BFP,- a Partnership" consists of Russell J. Barton, Sheldon and Ann Fant Foreman, and Wayne and Marlene Pedersen (p. 4, section 1 (a)(iv)); the Foremans were awarded $200,000.00 against the Pedersens and Randy Jones (pp. 7-8, section 3); and Barton was awarded $60,000.00 against the Pedersens and Randy Jones (Id.)

9. Based upon my review of the Court file and the pleadings contained therein, it appears that title to the subject property was quieted in favor of Sheldon and Ann Fant Foreman, not Respondent/Debtor. The Announcement of Decision, prepared by the trial judge and filed within a few days after the trial, clearly reflects this. I am informed and believe, and based thereon allege, that a

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monetary award in that action. The only $60,000.00 award made therein was to Russell J. Barton.

12. I feel that Respondent/Debtor, its counsel and others are attempting to perpetrate a fraud on this Court and the Superior Court. Respondent/Debtor was an entity formed primarily for the use and benefit of Sheldon L. Foreman and Ann Fant Foreman. As indicated in the Statement (p. 3, section 1(a)(i)), they owned the subject property prior to Respondent's/Debtor's formation. Wayne and Marlene Pedersen were going to buy the subject property from the Foremans (p. 4, section 1(a)(iii)). The Pedersens were then going to transfer title to the subject property into Respondent/Debtor, the partnership (p. 4, Section 1 (a)(iv)). After escrow closed, title to the subject property was conveyed to Respondent/Debtor by a deed "without written

authority" (p. 5, section 1(a)(vi)). The Announcement says that the title (attempted to be so conveyed) "did not pass to [Respondent/Debtor]" (p. 2). The Superior Court thus determined that the transfer of title from the Foremans to the Pedersens was rescinded (p. 3, section 1). Respondent/Debtor therefore never received title to the subject Property. Because the Foremans presumably did not want to affect the personal credit or assets, Respondent/Debtor filed this bankruptcy.

I declare under penalty of perjury according to the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 22nd day of November 1989, at Los Angeles, California.

/s/ Dennis Roy
DENNIS ROY

EXHIBIT "8" TO SUPPLEMENTAL DECLARATION

ANNOUNCEMENT OF TENTATIVE DECISION

FILED
JUL 21 1989

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

* * *

CHAMBERS OF

WALTER W. CHARAMZA

JUDGE , RETIRED

ROY B. WOOLSEY, ESQ.
WOOLSEY, ANGELO & THATCHER
2099 San Joaquin Hills Rd.
Newport Beach, CA 92660

RICHARD D. BRADY, ESQ.
650 Town Center Dr. Ste. 1900
Costa Mesa, CA 92626

ANDO LaFORM LOPEZ, ESQ.
4486 Hamilton ST.
San Diego, CA 92116

B.F.P.,a Partnership vs PEDERSEN & CROSS-ACTION
X-54-16-04
ANNOUNCEMENT OF TENTATIVE DECISION

This is the Court's TENTATIVE DECISION. A STATEMENT OF DECISION was requested; therefore Mr. Woolsey, attorney for Plaintiffs shall prepare a pro-

posed STATEMENT OF DECISION and a PROPOSED JUDGMENT. Counsel for Defendants shall specify any controverted issues or proposals for the STATEMENT OF DECISION by August 4, 1989 by written request to the Court with a copy to Mr. Woolsey. Such requests shall be considered by Mr. Woolsey in the preparation of the PROPOSED STATEMENT OF DECISION which is to be completed along with the PROPOSED JUDGMENT and served and filed with the Court on or before August 21, 1989.

These findings of fact may to some extent be academic but are made in the event they become necessary pending finality of this action.

Wayne L. Pedersen executed the purchase agreement, the partnership agreement and each deed and trust deed on which his signature appears. He is charged with knowledge of the contents of such documents and had a contractual duty

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defendants WAYNE L. PEDERSEN and MARLENE M. PEDERSEN concerning said real property be and they are rescinded.

a) The court bases its decision on the following facts:

(i) Prior to and on August 25, 1987, plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN owned said real property; an escrow to sell to a third party was pending;

(ii) Plaintiff RUSSELL J. BARTON and said buyer agreed that RUSSELL J. BARTON remodel the house, resell it, and each participate in the profits;

(iii) Plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN, and RUSSELL J. BARTON and defendant WAYNE L. PEDERSEN orally agreed that WAYNE L. PEDERSEN and MARLENE M. PEDERSEN buy said property and be substituted in as buyers in said escrow using coins as a down payment and pay to the FOREMANs the proceeds of a

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THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

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BARTON have seventy-five percent and the PEDERSENs twenty-five percent of the profits.

(v) In reliance upon said oral agreements referred to in (iv) above, the plaintiffs permitted the escrow to be closed on August 25, 1987; the PEDERSONs knowingly accepted the benefits of said partnership agreement and said oral agreements and were charged with knowledge of the contents and bound thereby.

(vi) The deed dated August 25, 1987 to B.F.P. was signed by WAYNE L. PEDERSEN, who also caused the name of MARLENE M. PEDERSEN to be affixed to said deed without written authority signed by MARLENE M. PEDERSEN; it was recorded on September 11, 1987.

(vii) On August 27, 1987, plaintiff B.F.P. made, executed and delivered its note and trust deed securing the note

describing SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries. Said trust deed was recorded on September 16, 1987.

(viii) Plaintiffs were at all times hereinabove mentioned in open, notorious, conspicuous possession of said real property;

(ix) By reason of the recording on September 11, 1987, the deed signed by WAYNE L. PEDERSEN describing him and MARLENE M. PEDERSEN as grantors and B.F.P. as grantee, the recording on September 16, 1987 of the trust deed to plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries, and of said possession, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. and GARY DWIGHT HENIG had a duty to inquire and minimum inquiry would have discovered plaintiffs' rights and said defendants OFF-ROAD VEHICLES - RECREATION

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rights, and defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN and OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., sought the benefits of the agreements and deeds in violation of them free and clear of the burdens thereunder and when accepting the deed to OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., it had notice of the rights of plaintiffs.

2. As to the issue of quiet title to said real property, the note secured by deed of trust held by plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN, and said trust deed as against defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., a California corporation, and GARY DWIGHT HENIG, the Court's decision is that title should be quieted as against defendants.

a) The court bases its decision on

the facts stated in a) of 1 above and 1 a) above is incorporated herein by reference, and that plaintiffs had and have the right to immediate possession of and title to said real property, said note and said deed of trust.

b) The legal basis for the decision is that as against defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES RECREATION AND FAMILY CAMP-GROUND, INC. and GARY DWIGHT HENIG, plaintiffs have the right to the immediate possession and title to said real property, said note and said second trust deed securing said note payable to them and OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. had constructive notice thereof and said defendants have no right, title or interest in or to said real property, note and trust deed.

3. As to the issue of damages the court's decision is that plaintiffs

SHELDON L. FOREMAN and ANN FANT FOREMAN recover $200,000.00 from defendants, WAYNE M. PEDERSEN, MARLENE M. PEDERSEN and RANDY JONES, and each of them, and that plaintiff RUSSELL J. BARTON recover $60,000.00 as against said defendants.

a) The court bases its decision on the following facts

(i) 1 a) above is hereby incorporated herein by reference including paragraphs thereof (i) through (xii).

(ii) RANDY JONES knowingly processed the deed describing WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantors and B.F.P. as grantee, informed the notary public that he had witnessed the signature of MARLENE M. PEDERSEN when in fact he had not witnessed the signature of MARLENE M. PEDERSEN on said deed. Thereafter, he and the PEDERSENs caused the notary to affix her jurat and seal to the deed, and plaintiffs to rely on it.

(iii) The false representation by RANDY JONES that he had witnessed the signature of MARLENE M. PEDERSEN and the deed by WAYNE L. PEDERSEN and MARLENE M. PEDERSEN to OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. describing said real property proximately and legally caused the frustration of the project of the partnership to improve and resell the property.

(iv) Upon remodeling, pursuant to the partnership agreement, B.F.P. would have been able to sell the property for over $80,000.00 more than the amount of the first trust deed, the second trust deed, costs of remodeling and other costs, and RUSSELL J. BARTON would have been entitled to $60,000.00 thereof.

(v) As a direct and proximate result of said representation, said negligence, and said deed, plaintiff SHELDON L. FOREMAN and ANN FANT FOREMAN were damaged

in the sum of $200,000.00 and RUSSELL J. BARTON was damaged in the sum of $60,000.00.

b) The legal basis for the court's decision is that the negligence and false representation of RANDY JONES and the making and executing of said deed describing defendant OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. as grantee proximately caused said damages and plaintiffs are entitled to have and recover of and from said defendants, and each of them, jointly and severally, said sums.

4. As to the issue of whether or not plaintiff' claim of title was based on instruments and/or documents which were a sham or obtained by fraud, the court decides that they were not a sham or based on fraud.

a) The court bases its decision on the following facts, to wit, the deed to

B.F.P. was in fact signed by WAYNE L. PEDERSEN and defendant, MARLENE M. PEDERSEN, was bound by a contract, to wit, the partnerships agreement which was signed with her authority to convey such title and nothing was conveyed to cross-complainant OFF-ROAD VEHICLES RECREATION AND FAMILY CAMPGROUND, INC. because of the facts found in 1 a) and 2 a) above, which are incorporated herein by reference.

b) The legal basis for the decision is as stated in 2 b) and 2 b) above, which are hereby incorporated herein by reference and failure of consideration for the deed from the FOREMANs to the PEDERSENs.

5. As to the issue raised by the cross-complainant WAYNE L. PEDERSEN of whether or not WAYNE L. PEDERSEN divested B.F.P. of title by reconveyance and whether or not B.F.P. is thereby

barred from denying title is vested in the cross-complaint of OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., and the court finds that title is not vested in OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., and PEDERSENs did not divest B.F.P. of title, the court bases its decision on the following:

a) Paragraphs 1 a) and 2 a) above are hereby incorporated herein by reference.

b) The legal basis for the court's decision is that the partner could not convey said property of the partnership, he had already conveyed said property to the partnership, and his deed to OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC. had no effect.

6. As to the issue raised by the allegations by cross-complainant that B.F.P. acquired property by fraud or

forgery, the court decides B.F.P. did not acquire property by fraud or forgery.

a) The court basis its decision on the facts stated in 1 a) and 1 b) above, which are hereby incorporated hereby by reference, and on the fact that there was no proof of any fraud or forgery by cross-defendant B.F.P.

b) The legal basis of the court's decision is that there was no evidence of misrepresentation, fraud or forgery by any plaintiff.

7. On the issue of whether or not SHELDON L. FOREMAN and RUSSELL J. BARTON conspired to defraud cross-complainant WAYNE L. PEDERSEN, defendant MARLENE M. PEDERSEN, or either of them, the Court finds that there was no such conspiracy to defraud.

a) The court bases its decision on the fact that there was no evidence of a conspiracy.

b) The legal basis of the court's decision is that conspiracy can be proven only by evidence of a conspiracy, and there was none.

8. As to the issue of whether or not SHELDON L. FOREMAN and RUSSELL J. BARON conspired to deprive cross-complainant of possession of the real property, the court finds that they did not conspire.

a) The court bases its decision on the facts contained in 1 a) and 2 a) above, which are hereby incorporated herein by reference and that B.F.P. permitted the FOREMANs to remain in possession.

b) The legal basis of the court's decision is that there was no conspiracy to do wrong or violate any right of cross-complainant, and possession by SHELDON L. FOREMAN was with the right, title and interest, and the consent of

cross-complainant was therefore not required.

9. As to the issue of whether or not plaintiffs' complaint and causes of action state facts sufficient to constitute a cause of action, the court's decision is that they do.

a) The court basis its decision on the facts contained in paragraphs 1 a), 2 a), 3 a), 4 a), and 5 a), said facts were substantially pleaded and said subparagraphs are hereby incorporated herein by reference.

b) The legal basis for the court's decision is as contained in paragraphs 1 b), 2 b), 3 b), 4 b) and 5 b) and are hereby incorporated herein by reference.

10. As to the issue of whether or not the action is barred in whole or in part by the statute of limitations, the court decides that they were not so barred.

a) The court bases its decision on the following facts and the acts complained of occurred in 1987, the above entitled action was filed on November 24, 1987.

b) The legal basis for the court's decision is that the applicable statute required the time lapsing between the arising of the cause of action and the filing of the complaint of to be three years or more, and the time lapsed here was less than one year.

11. As to the issue o whether or not the damages were caused by plaintiffs acts, omission, carelessness or negligence and recovery barred, the court finds that they were not so barred.

a) The court bases factual basis for the court's decision is contained in paragraphs 1 a), 2 a), 3 a), 4 a) and 5 a) above are hereby incorporated herein by reference.

b) The legal basis for the court's decision is that plaintiffs' reliance on the facts were justified and the liability of cross-complainants is based on an intentional misrepresentation as well as a negligent misrepresentation that he had witnessed the signature of MARLENE M. PEDERSEN.

The clerk was ordered to enter judgment in accordance with the foregoing and that plaintiffs recover costs.

Dated: October 12, 1989

/s/Walter W. Charamza

WALTER W. CHARAMZA

JUDGE OF THE SUPERIOR COURT

ASSIGNED

IMPERIAL'S ANSWER TO COMPLAINT

TO DECLARE TRANSFER ETC.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. SA 89-06771 JR
BFP, a Partnership, Debtor.	Adv. No. SA 89-0977 JR Chapter 11

BFP, A Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, et al, Defendants.	ANSWER TO COMPLAINT TO DECLARE TRANSFER OF REAL PROPERTY NULL AND VOID, AND TO VACATE & SET ASIDE TRUSTEE'S DEED OF TRUST AND FOR DAMAGES

Defendant IMPERIAL SAVINGS ASSOCIATION (hereinafter "ISA"), for itself and itself along, answers the Complaint to Declare Transfer of Real Property Null and Void, and to Vacate and Set Aside Trustee's Deed of Trust and For Damages

filed by Plaintiff in this matter as follows:

1. ISA admits the allegations of paragraph 1.

2. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 2 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

3. ISA admits the allegations of paragraph 3.

4. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 4 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

5. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 5 of the Complaint and, on that basis, denies each and every

allegation contained in this paragraph, and the whole thereof.

6. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 6 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

7. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 7 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

8. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 8 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

9. ISA lacks sufficient information or belief to respond to the allegations

contained in paragraph 9 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

10. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 10 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

11. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 11 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

12. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12a of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

13. ISA admits the allegations contained in paragraph 12b of the Complaint.

14. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12c of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

15. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12d of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

16. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 12e of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

17. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 13 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

18. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 14 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

19. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 15 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

20. In responding to paragraph 16 of Trustee's Complaint, ISA admits that it recorded a Notice of Default and Election to Sell against the subject Property. ISA admits that a Trustee's

Sale of the subject Property was originally scheduled for December 29,1988. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 16 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

21. ISA admits that an involuntary petition was filed by Off Road Vehicles in the Central District of California. ISA lacks information or belief as to whether Off Road Vehicles alleged BFP was insolvent.

22. ISA admits that the bankruptcy petition stated BFP's address was 3303 F-1 Harbor Boulevard, Costa Mesa, California. ISA lacks information or belief as to whether the address was incorrect.

23. In responding to paragraph 19, ISA admits that it attended the hearing on May 11, 1989. ISA admits that Russell

Barton was present at the hearing. ISA admits that Russell Barton was represented by Roy B. Woolsey who was also present at the hearing. ISA admits the Off Road Vehicles was represented by Armando Lopez, Esq., who was present at the hearing. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 19 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

24. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 20 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof. However, admits that it attended the hearing on May 11, 1989.

25. ISA admits the allegations of paragraph 21.

26. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 22 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

27. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 23 therein and the whole thereof.

28. In response to paragraph 24 of Plaintiff's complaint, ISA admits that said notice stated there would be a hearing on said motion on June 12, 1989. ISA admits that the Bankruptcy Court made an Order Granting said Motion. ISA admits that BFP did not appear at said hearing. ISA admits that it forwarded a Judgment and Order Vacating Automatic Stay to the Bankruptcy Court together with an affidavit that BFP was served by mailing to 3033 F-1 Harbor Boulevard,

Costa Mesa, CA. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 24 therein and the whole thereof.

29. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 29 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

30. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 26 therein and the whole thereof.

31. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 27 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

32. ISA admits that the Trustee's Sale was conducted on July 12, 1989. ISA

admits that the subject property was sold for $433,000.00. Defendant denies, generally and specially, each, every, and all of allegations contained in paragraph 28 therein and the whole thereof.

33. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 29 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

34. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 30 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

35. ISA admits that the foreclosure sale was conducted on or around July 12, 1989. Defendant denies, generally and specially, each, every, and all of the allegations contained in paragraph 31

therein and the whole thereof.

36. ISA lacks sufficient information or belief to respond to the allegations contained in paragraph 32 of the Complaint and, on that basis, denies each and every allegation contained in this paragraph, and the whole thereof.

AFFIRMATIVE DEFENSES

As and for separate and affirmative defenses to the causes of action alleged in the Complaint, Defendant IMPERIAL SAVINGS ASSOCIATION alleges as follows:

FIRST AFFIRMATIVE DEFENSE

37. The Complaint, and each cause of action contained therein, fails to set forth facts sufficient to state a cause of action against this answering Defendant.

SECOND AFFIRMATIVE DEFENSE

38. Plaintiff, by its conduct, has waived any and all right to the recovery prayed for herein.

THIRD AFFIRMATIVE DEFENSE

39. Plaintiff, by its conduct, is estopped from seeking the relief prayed for herein.

FOURTH AFFIRMATIVE DEFENSE

40. Plaintiff's recovery is barred by the doctrine of unclean hands. Plaintiff and Plaintiff's counsel were aware that the involuntary Chapter 11 petition filed against Plaintiff by Off Road Vehicles had been dismissed at BFP's own request by Order entered June 14, 1989 (See Exhibit "A" attached hereto). No Automatic Stay remained in effect after dismissal of the involuntary petition. Furthermore, BFP has filed a Complaint in the Orange County Superior Court on August 18,1989 naming ISA as a party Defendant, which Complaint (see Exhibit "B") is almost identical to the Complaint filed in the instant bankruptcy proceeding. Plaintiff has continued to prose-

cute the Superior Court action even after filing the within Chapter 11 petition and the instant adversary action, and while taking advantage of the protection of this Court (Attached As Exhibit "C" is the At Issue Memorandum prepared by Mr. Woolsey on December 20,1989, which was served on the same date).

FIFTH AFFIRMATIVE DEFENSE

41. The within Complaint has been filed by Plaintiff and its counsel in bad faith and both Plaintiff and Plaintiff's counsel have violated Bankruptcy Rule of Procedure 9011(a) in filing the complaint.

WHEREFORE, DEFENDANT PRAYS:

1. That Plaintiff take nothing by its Complaint.

2. That Plaintiff's Complaint be dismissed with prejudice.

3. For costs of suit herein incurred.

4. For reasonable attorneys' fees awarded to Defendant according to proof;

5. For sanctions against Plaintiff and Plaintiff's counsel according to proof.

6. For such other and further relief as the Court deems just and proper.

DATED: January 18, 1990

LAW OFFICES OF EDWARD G. SCHLOSS

By /s/ Mary C. Caroom

* * *

[NO PROOF OF SERVICE ATTACHED]

STATEMENT CONCERNING MINUTES OF COURT FOR FEBRUARY 6, 1990

The minutes of court are not in the court file and we have been unable to locate the same. We verily believe that the abbreviated entry which appears in the docket entries hereinabove in this Appendix accurately reflects a statement contained in the minutes.

DEFENDANT IMPERIAL SAVINGS ASSOCIATION'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS

FILED APR 5 90

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. SA 89-06771 JR
BFP, a Partnership, Debtor.	Adv. No. SA 89-0977 JR Chapter 11

BFP, A Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, Defendants.	NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS [FRPC 12(C)]; POINTS AND

* * *

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on April 27, 1990 at 11:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, before the Honorable John

Ryan, United States Bankruptcy Judge, presiding in Courtroom 520 in the United States Bankruptcy Court located at 34 Civic Center Plaza, Santa Ana, California, Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION, will and hereby does move the court for Judgment on the pleadings on the claim upon which relief can be granted, on the grounds that no transfer occurred within one (1) year of the filing of the Chapter 11 petition.

The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, and the pleadings and papers filed herein.

DATED: March 21, 1990

LAW OFFICES OF EDWARD G. SCHLOSS

/s/ Mary C. Caroom
MARY C. CAROOM, ESQ.
Attorneys for Movant/Defendant
IMPERIAL SAVINGS & LOAN
ASSOCIATION

[NO PROOF OF SERVICE IN THE RECORD]

DEFENDANT IMPERIAL SAVINGS ASSOCIATION'S

NOTICE OF MOTION AND MOTION FOR

SUMMARY JUDGMENT

FILED
APR 5 3:54PM '90
CLERK U.S. BKCY COURT
CENTRAL DIST. OF CALIF.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:	Bk. No. SA 89-06771 JR
BFP, a Partnership, Debtor.	Adv. No. SA 89-0977 JR Chapter 11
BFP, A Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCY; and DOES 1 TO 10, Defendants.	DEFENDANT IMPERIAL SAVINGS ASSOCIATION'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT Hearing - DATE: April 27, 1990 TIME: 11:30 a.m. PLACE:Courtroom 520

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on April 27, 1990 at 11:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, before the Honorable John Ryan, United States Bankruptcy Judge, presiding in Courtroom 520 in the United States Bankruptcy Court located at 34 Civic Center Plaza, Santa Ana, California, Defendant, IMPERIAL SAVINGS & LOAN ASSOCIATION, will and hereby does move the court for Summary Judgment on the ground that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law for the reason that no transfer occurred within one (1) year of the filing of the Chapter 11 petition as is required in order to state a cause of action pursuant to 11 U.S.C. Section 548(a)(2).

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all pleadings and papers on file in this action, including the Motion for Judgment on the Pleadings filed concurrently herewith, and upon such other matters as may be presented to the Court at the time of the hearing.

DATED: March 27, 1990

LAW OFFICES OF EDWARD G. SCHLOSS

By: /s/ Mary C. Caroom
MARY C. CAROOM, ESQ.
Attorneys for Movant/Defendant
IMPERIAL SAVINGS & LOAN ASSOCIATION

[NO PROOF OF SERVICE IN THE RECORD]

DECLARATION OF TONI SCANDLYN

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Bk. No. SA 89-06771 JR
BFP, a Partnership,	Adv. No. SA 89-0977 JR
Debtor.	Chapter 11

BFP, a Partnership,	DECLARATION OF TONI SCANDLYN IN SUPPORT OF MOTION FOR JUDGMENT ON PLEADINGS [FCRP 12(c); BR 7012] AND FOR SUMMARY JUDGMENT
Plaintiff,	
vs.	
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation;	Continued Hearing -- Date: May 21, 1990 Time: 11:30 a.m. Place: U.S. Bankruptcy Court 34 Civic Center Plaza Santa Ana, CA Courtroom 520
Defendant.	

DECLARATION OF TONI SCANDLYN

I, TONI SCANDLYN, declare and state as follows:

1. As to the following facts, I now them to be of my own knowledge, and if called upon to testify herein, I

could and would testify competently to those facts.

2. I am an employee of IMPERIAL SAVINGS ASSOCIATION, Defendant herein, and I am the person familiar with the first trust deed loan and the foreclosure of the subject property.

3. Movant/Defendant Imperial Savings Association ("Imperial" herein) was the payee of a promissory note dated August 4, 1987 in the principal amount of $356,250.00 which was secured by a deed of trust thereinafter "trust deed") in the first position encumbering real property generally described as 225 Via Genoa, Newport Beach, California. True and correct copies of said note and trust deed are attached hereto as Exhibits "A" and "B" respectively. Imperial was the successor in interest to Loan Marketing and Brokers Services, Inc., the original beneficiary under the subject

trust deed by assignment recorded August 25, 1987 (Exhibit "C").

4. When the trust deed loan went into default Imperial elected to initiate foreclosure proceedings. A Notice of Default and Election to Sell was recorded on July 29, 1988. A true and correct copy of said Notice of Default is attached hereto as Exhibit "D".

5. A Trustee's Sale of the subject property was originally scheduled for December 29, 1988. A true and correct copy of the Notice of Trustee's Sale is attached hereto as Exhibit "E". Notice of the sale was published once a week for three consecutive weeks as required by the laws of the State of California.

6. Said Trustee's Sale was postponed from time to time when Imperial learned that, on or around December 21, 1988, an involuntary Chapter 11 Bank-

ruptcy proceeding, case number SA 88-07521 JR, had been commenced against Plaintiff/Debtor, BFP, a Partnership ("BFP" herein) by Off-Road Vehicles.

7. After ascertaining that the Bankruptcy case had been dismissed, a Trustee's Sale of the property was conducted on July 12, 1989. The property was sold to Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz and Richard Marcz for $433,600.00. A cash payment was tendered by the purchasers immediately following the sale. A true and correct copy of the Trustee's Deed Upon Sale is attached hereto as Exhibit "F".

8. After deducting $421,815.72, representing a complete payoff of the debt secured by the trust deed plus costs of sale, there remained $11,784.28 in surplus proceeds.

9. Imperial did not have any busi-

ness relationship with the third party purchasers prior to the sale, not did Imperial receive any benefit by virtue of the fact that the property was purchased by a third party Trustee's Sale.

I declare under penalty of perjury that the foregoing true and correct.

Executed this 27th day of April, 1990, at San Diego, California.

TONI SCANDLYN

[SEPARATE PROOF OF SERVICE

DN 27, OMITTED IN REPRODUCING]

DECLARATION OF MARY C. CAROOM

FILED MAY 7, 1990 (DN24)

* * *

UNITED STATES BANKRUPTCY COURT

[illegible]YJRC.

BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation, Defendant.	CAROOM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS [FRCP 12(c); BR 7012] AND FOR SUMMARY JUDGMENT Continued Hearing - Date: May 21, 1990 Time: 11:30 a.m. Place: U.S.Bankruptcy Court 34 Civic Center Plaza Santa Ana, CA Courtroom 520

I, MARY C. CAROOM, declare and state as follows:

1. As to the following facts, I know them to be true of my own knowledge, and if called upon to testify herein, I could and would testify competently to those facts.

2. I am the attorney of record for Movant herein, and I am the person most familiar with the ongoing State Court and

Bankruptcy Court litigation herein.

3. Sometime prior to July, 1989, Respondent/Debtor BFP, a Partnership (BFP" herein) and others filed a Superior Court action as to the subject property in the Superior Court for the County of Orange (Case No. X-54-16-04). Imperial Savings was not a party to that action. BFP's present counsel, Roy Woolsey, represented BFP and others therein.

4. I have reviewed the Superior Court file with respect to that action.

5. A trial was apparently held in the aforementioned action on or about July 17, 1989. On July 21, 1989, an Announcement of Tentative Decision, apparently prepared by the Superior Court Judge who conducted the trial, was filed in that action. A true and correct certified copy thereof is attached hereto as Exhibit "A" and incorpo-

rated herein by reference. I have compared this copy with the original in the court file, and it is identical to the original.

6. The Announcement specifically states that: (i) the conduct of the Pedersons requires the rescission of the Foreman's deed as between the parties; (p. 2); (ii) title to the subject Property was quieted in favor of Sheldon L. Foreman and Ann Fant Foreman (p. 3); and (iii) the Foremans received a monetary award of $200,000.00, while Russell J. Barton received an award of $60,000.00 (p. 3). Nowhere in the Statement of Tentative Decision does it say that BFP shall have an interest in the property.

7. On October 12, 1989, a Statement of Decision was filed in the aforementioned action. It was apparently prepared by Roy B. Woolsey, BFP's coun-

sel. A true and correct certified copy thereof is attached hereto as Exhibit "B" and incorporated herein by reference. I have compared this copy with the original in the Court file, and it is identical to the original.

8. This Statement of Decision specifically states that: transfer of title to the subject property by Sheldon Leroy Foreman and Ann Fant Foreman to Wayne and Marlene Pederson was rescinded (pp. 2-3, Section 1); the deed from the Pederson's to BFP was signed without the authority of Marlene Pederson (p. 5, Section 1(a)(vi); BFP was aware of the default owed to Imperial Savings, its foreclosure proceedings and the trustee's sale held on July 12, 1989 (p. 6, Section 1(a)(xii); "BFP, a Partnership" consists of Russell J. Barton, and Wayne and Marlene Pederson (p. 4, Section 1(a)(iv)); the Foremans

were awarded $200,000.00 against the Pedersons and Randy Jones (pp. 7-8, Section 3) and Barton was awarded $60,000.00 against the Pedersons and Randy Jones (Id.) Nowhere in the Statement of Decision does it state that title is quieted in favor of BFP.

9. On October 12, 1989 a Judgment was entered in the aforementioned action. It was apparently prepared by Roy B. Woolsey, BFP's counsel. A true and correct certified copy thereof is attached hereto as Exhibit "C" and incorporated herein by this reference. I have compared this copy with the original in the court file, and it is identical to the original.

10. This judgment specifically states that: as between the Foremans and the defendants, the deed describing the Foremans as grantors and the Pedersons as grantees is rescinded (pp.2-3);

that the Pedersons have no right, title, estate or interest in or to said real property (p.3); and that plaintiffs BFP and the Foremans are the sole owners of said real property in fee simple (p.3).

11. Based upon my review of the Court file and pleadings contained therein, it appears that title to the subject property was quieted in favor of Sheldon and Ann Fant Foreman, not BFP. The Announcement of Tentative Decision prepared by the trial judge and filed within a few days of the trial, clearly reflects this as does the Statement of Decision prepared by Mr. Woolsey. I am informed and believe, and based thereon allege, that the judgment is incorrect and inaccurate when it declares BFP and the Foremans are the sole owners of the subject real property.

12. BFP's Schedule B-3 filed in the underlying bankruptcy herein states

that BFP owns a $60,000.00 judgment rendered in the aforementioned Superior Court action. As indicated by the Announcement and Statement, however, BFP did not receive any monetary award in that action. The only $60,000.00 award made therein was to Russell J. Barton.

* * *

I declare under penalty of perjury according to the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 1ST day of May, 1990, at Los Angeles, California.

/s/ MARY C.CAROOM

[P'S & A'S OMITTED IN PRINTING]

[SEPARATE PROOF OF SERVICE

DN 27 OMITTED IN REPRODUCING]

EXHIBIT A

TENTATIVE DECISION OF STATE COURT ACTION

APPEARS AS EXHIBIT "8" TO EXHIBIT "C"

OF MOTION TO DISMISS ETC.

It is incorporated herein by reference.

EXHIBIT B

STATEMENT OF DECISION IN STATE COURT

APPEARS AS EXHIBIT "9" TO EXHIBIT "C"

OF MOTION TO DISMISS ETC.

It is incorporated herein by reference.

EXHIBIT "C" TO DECLARATION OF CAROOM

FILED MAY 7 1990 (DN 24)

FILED OCT 12 1989
GARY L. GRANVILLE, County Clerk

* * *

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

B.F.P., a Partnership, et al.,

Plaintiffs,

vs.

WAYNE L. PEDERSEN, et al.,

Defendants.

Case No. X-54 16 04

JUDGMENT

---

* * *

The above-entitled cause came on regularly for trial on July 17, 1989, in Department 91 of the above-entitled Court, the Honorable Walter W. Charamza, presiding without a jury, a jury having been waived, and was tried on that date, and on July 18, 1989, Roy B. Woolsey, and Woolsey, Angelo & Thatcher by Roy B. Woolsey, appeared as counsel for plain-

tiffs and cross-defendants B.F.P., a Partnership, RUSSELL J. BARTON, SHELDON L. FOREMAN and ANN FANT FOREMAN, and Armando LaForm Lopez, Esq., appeared as counsel for defendant and cross-complainant OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., a California corporation, and defendant GARY DWIGHT HENIG, and Richard D. Brady, Esq., appeared for defendant RANDY JONES, and the default of WAYNE L.PEDERSEN and MARLENE M. PEDERSEN has been entered.

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The Court, has considered the evidence, heard the arguments of counsel and has made its Statement of Decision.

IT IS ORDERED, ADJUDGED AND DECREED that as between SHELDON LEROY FOREMAN, ANN FANT FOREMAN, and defendants WAYNE L.

PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMP-GROUND, INC. and GARY DWIGHT HENIG, the deed describing SHELDON L. FOREMAN and ANN FANT FOREMAN as grantors, and WAYNE L. PEDERSEN and MARLENE M. PEDERSEN as grantees, and describing real property in the City of Newport Beach, County of Orange, State of California, described more particular as follows:

Lots 946 and 947 of Tract No. 907 as shown on a Map recorded in book 28, pages 25 to 36 inclusive of Miscellaneous Maps, together with the Northwesterly 17 feet of that Portion of Via Genoa adjoining said land on the Southeast abandoned by resolution of the City Council of the City of Newport Beach, a certified copy of which resolution was recorded June 10, 1953, in Book 2518, page 348, Official Records,

in the office of the county recorder of said county.

also known as 225 Via Genoa, Newport Beach, California, and the escrow instructions between said plaintiffs and defendants WAYNE L. PEDERSEN and MARLENE M. PEDERSEN concerning said real property, be and they are rescinded.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff B.F.P., SHELDON L.FOREMAN and ANN FANT FOREMAN are the sole owners of said real property in fee simple, and SHELDON L. FOREMAN and ANN FANT FOREMAN are the owners of the note secured by deed of trust describing said real property and said SHELDON L. FOREMAN and ANN FANT FOREMAN as beneficiaries, dated September 16, 1987 and defendants WAYNE L. PEDERSEN, MARLENE M. PEDERSEN, OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., a California corporation, and GARY DWIGHT HENIG, have no

right, title, estate or interest in or to or lien on said real property, said note and in said trust deed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs SHELDON L. FOREMAN and ANN FANT FOREMAN recover $200,000.00 from defendants, WAYNE L. PEDERSEN, MARLENE M. PEDERSEN and RANDY JONES, and each of them, and that plaintiff RUSSELL J. BARTON recover $60,0000.00 from defendants, WAYNE L. PEDERSEN, MARLENE M. PEDERSEN and RANDY JONES, and each of them.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs and cross-defendants recovery their costs of suit incurred herein in the sum of $_____.

The clerk is ordered to enter judgment in accordance with the foregoing.

Dated: October 12, 1989

/s/ Walter W. Charamza
WALTER W. CHARAMZA
JUDGE OF THE SUPERIOR COURT
ASSIGNED

EXHIBIT "D" TO DECLARATION OF CAROOM

FILED JUNE 13 1989
ENTERED JUNE 14 1989

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	CASE NO. SA 88-07521-JR
BFP, a Partnership	DISMISSAL OF PETITION FOR ADJUDICATION OF INVOLUNTARY BANKRUPTCY
Debtor.	

* * *

The petition of OFF-ROAD VEHICLES-RECREATION AND FAMILY CAMPGROUND, INC. for an adjudication of the above named debtor as a debtor entitled to relief under Chapter 11 of the Bankruptcy Laws of the United States, came on regularly for hearing before the Honorable John Ryan, Bankruptcy Judge presiding on May 11, 1989, Armando LaForm Lopez, Esq., appearing for OFF-ROAD VEHICLES - RECREATION AND FAMILY CAMPGROUND, INC., Russell Barton, partner of BFP, being present in

open Court, and Roy B. Woolsey appearing for said Russell Barton. Plaintiff, in its opening statement claimed to be a partner entitled to bring a proceeding under 11 U.S.C. Section 303(b)(3)(A). The Court finds from the statements made in the opening statement that it is not such a partner, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition for Adjudication of OFF-ROAD VEHICLES RECREATION AND FAMILY CAMPGROUND INC. be and the same is hereby dismissed.

Dated: June 13, 1989

/s/ John E. Ryan
JUDGE OF BANKRUPTCY COURT

Submitted by:

ROY B. WOOLSEY, ESQ.,

/s/ Roy B. Woolsey
ROY B. WOOLSEY
Attorneys for RUSSELL BARTON

DECLARATION OF ROY B. WOOLSEY,

RUSSELL BARTON AND ROY FOREMAN

FILED
90 MAY 17 P 2:26
CLERK U.S. BANKRUPTCY COURT

* * *

UNITED STATES BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re: BFP, a Partnership, Debtor.	CASE NO. SA 89 06771 JR Adv. No. SA 89-0977 JR
BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; Defendants.	DECLARATION OF ROY B. WOOLSEY, RUSSELL BARTON, AND SHELDON L. FOREMAN IN FURTHER SUPPORT OF MOTION FOR CONTINUANCE AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS * * *

DECLARATION OF ROY B. WOOLSEY

I, ROY B. WOOLSEY, certify and declare that:

1. I am the attorney for Debtor in the above entitled matter.

2. I have personal knowledge of the following facts, except those to which I say I verily believe, and, if called to testify, could and would competently do so as to the following facts.

3. The $11,784.27 surplus of the bid over the complete payoff of the deed of trust referred to in the Declaration of Tony Scandlyn, page 3 lines 13-15 has never been tendered to the Debtor or to the Foremans, the holder of the junior trust deed.

4. In the Declaration of Mary C. Caroom it is stated at page 2, lines 27 to page 3, lines 2, that nowhere in the Statement of Decision does it say that BFP shall have an interest in the property. There was no issue as to BFP's interest in the property presented to the Court. The Foremans and BFP were plaintiffs and they claimed the property as against the defendants. There was no

claim as to who had title to the property as between the Foremans and BFP.

5. At page 3, lines 10-23, it is stated that the transfer of the property by the Foremans to the Pedersens was rescinded. The Statement of Decision did not have before it the issue of whether or not the rescission was as between the plaintiffs, it merely had to do with whether or not the plaintiffs had a right to rescind as against the defendants. The defendants in that case were the Pedersens, and Off-Road Vehicles.

6. At page 4, lines 6-8, she states that plaintiffs BFP and the Foremans were the sole owners of the property. That was true. that was the finding of the Court.

7. At page 4, lines 11-12, she states that it appears that title to the property was quieted in favor of the Foremans and not BFP. The title was

quieted in favor of plaintiffs Foreman as against the defendants. There was no showing the BFP did not have an interest in the property. I verily believe that BFP had contractual rights with respect to the property independently of the deed to the Pedersens.

8. On page 4, paragraph 12 of her affidavit she states that BFP's Schedule B-3 contained a statement that BFP had a claim for $60,000.00 against the Pedersens and she states that the judgment was not in favor of BFP but was in favor of RUSSELL J. BARTON. She is correct, but our error in the schedule would seem to make no difference in the above entitled adversary proceeding.

9. At page 4, line 13, Ms. Caroom makes an affidavit as to her feeling to the effect that I and others are perpetrating a fraud on the Court. Her feeling is irrelevant but her feeling

happens to be incorrect. BFP and others interested in BFP's position are not attempting to perpetrate a fraud on any Court.

10. On page 5, Mr. Caroom states that in the motion for relief from automatic stay in Case No. SA 88-07521 by Imperial Savings "BFP was served with all pleadings in the proceeding at the address stated in the Court record and file." She served BFP at the address given in the involuntary Petition. There may have been a record in the clerk's office using that address, however, she was personally present on May 11, 1989 when I appeared for Russell Barton, a partner of BFP who was acting for it, and argued against the petition for involuntary bankruptcy which had been filed by Off-Road, claiming to be a successor to the Pedersens partners. She attaches the order dismissing a case as Exhibit D. As

a part of said Exhibit D, there is the declaration of Lee Bradford that Mary Caroom was served with the proposed order on May 26, 1989. The card in upper left corner of the first page shows Roy B. Woolsey with the address as attorney for Russell Barton. BFP's answer to the petition for adjudication showed BFP's correct address. Nevertheless, her application for an order vacating the automatic stay was without any service on or notice to me and without any service at the actual address of the Debtor. It is requested that the court take judicial notice of that fact. The Debtor did not receive the notice. It is the practice of the Post Office to return to the sender postage paid mail that is not delivered. I verily believe that the notice was returned by the Post Office to the sender. The sender made no attempt to notify the Debtor, its partner or me.

If the Debtor, Russell Barton or I had received the notice, then the Debtor would have known that Imperial intended to have the sale and Debtor would have inquired as to the date of the sale. The conduct of Imperial is what has given rise to the problems of the Debtor. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 17th day of May, 1990, at Newport Beach, California.

/s/ Roy B. Woolsey
ROY B. WOOLSEY

DECLARATION OF RUSSELL BARTON

RUSSELL BARTON, certifies and declares that:

1. At all times during the existence of BFP, a Partnership, I have been a partner. The partnership was formed on or about August 26,1987 with Wayne Pedersen and Marlene Pedersen and

me as partners. However, later she said she did not sign the Partnership Agreement.

2. Initially, the only asset of the partnership was title to the premises at 225 Via Genoa, on Lido Isle, Newport Beach, California. That title was perfected by the findings and judgment in the quiet title action, copies of which are attached hereto as Exhibits A and B.

3. In May or June of 1989, after the hearing on the involuntary petition filed by OFF-ROAD bearing Case No. SA 88-07521-JR to have BFP adjudicated insolvent and subject to Chapter 11 of the Bankruptcy Code, in the hallway of the fifth floor of the Federal Building at Santa Ana, California, I heard the attorney for Imperial Savings say that they would not have the foreclosure sale referring to the property at 225 Via Genoa, Newport Beach, CA until after the

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THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

DECLARATION OF SHELDON L. FOREMAN

I, SHELDON L. FOREMAN declare and state as follows:

1. As to the following facts, I know them to be true of my own personal knowledge and, if called upon to testify herein, I could and would testify competently to those facts.

2. I and my wife, Ann Fant Foreman are the beneficiaries of a promissory note in the principal amount of $200,000.00 secured by a deed of trust burdening th real property described generally as 225 Via Genoa, Newport Beach, California, which deed of trust was dated August 27, 1987 and recorded on September 16,1987 (hereinafter referred to as the "Foreman Deed of Trust") subsequent to and junior to the deed of trust in favor of Loan Market Services recorded on August 25, 1987, the trustor of which was Wayne L. Pedersen and his wife Mar-

lene M. Pedersen, which deed of trust was subsequently assigned to Imperial Savings and Loan Association (hereinafter referred to as the "First Deed of Trust").

3. The Foreman Deed of Trust was the subject of litigation in Orange County Superior Court Case No.-54 16 04, entitled B.F.P., a Partnership ...; Sheldon L. Foreman; and Ann Fant Foreman; Plaintiffs vs. Wayne L. Pedersen, Marlene M. Pedersen, et al., Defendants. Said Case was heard on July 17, 1989 in Department 91 of said Court.

4. During the course of litigation I was in frequent contact with representatives of Imperial Savings & Loan Association (hereafter "Imperial") the beneficial owner of the Firsts Deed of Trust because the trustors and their subsequent assignees had failed to make any payments to lender on said First Deed of Trust. The representatives in charge

of the loan file for Imperial changed from time to time depending on where the matter had been assigned but it was a matter of which everyone I spoke with seemed to have intimate knowledge. In all cases, up to and including my contacts in May of 1989, they were cooperative and helpful to me as a junior lienholder. I told all of the said representatives first in the loan department, then in the foreclosure department, then to their attorney about the litigation and stated that as a junior lienholder I was able to and would protect my lien on the subject property but that because of the litigation I would not do so until the last minute or until the full validity of our lien had been established.

5. During April of 1988, I was told that Imperial had to take the property to sale or be paid and I was given an additional day after the then scheduled sale

date as a junior lienholder to bring the loan current, pay the delinquency charges and the foreclosure costs; which I did by driving to San Diego on April 28, 1988 and delivering a cashier's check in the amount of $31,296.54 made payable to L. C. Service Corporation as I had been instructed to do.

6. At the time of hand delivering the cashier's check, I again explained i detail why it was difficult for me to keep paying Imperial until the could on our lien had been lifted, describing the litigation in detail, and received from their representative assurances of every cooperation. I asked if I could purchase their First Deed of Trust to protect my lien position and was told that Imperial might consider such a proposition at a later date.

7. During December of 1988, an involuntary petition in Bankruptcy was

filed by the successor in interest to Wayne and Marlene Pedersen as a partner in BFP, a Partnership; and Imperial, which had still received no payments on their loan except those which I had made in April, postponed their sale date thereafter from month to month.

8. I regularly contacted Imperial by telephone to find out what new sale date had been scheduled.

9. On April 3, 1989, I telephoned Imperial, and spoke first to a representative in the foreclosure department and asked again if I could acquire their Deed of Trust so I could defend my position; I advised that I had made arrangements to have a friend borrow the necessary money from his Bank and that all he needed was to obtain a copy of their lenders foreclosure guaranty for his bank. I gave them the name of the friend, Mr. Everett L. Hodges and offered

to provide them with bank representations on his financial ability to purchase the First Deed of Trust. I then spoke with Janet Davis who was assigned the file while the matter was in the Bankruptcy Court and made the same requests.

10. On May 8, 1989, I talked with the Attorney for Imperial and made the same request regarding the acquisition of Imperial's First Trust Deed and the need for a copy of the lenders foreclosure guaranty describing in full the litigation; the difficulty of my position as a disputed junior lienholder in making payments to Imperial which could be resolved if Imperial would sell their position. He said that he didn't see any problem with giving me a copy of the foreclosure guaranty and advised me that he was familiar with the attorney who represented the defendants. I specifically asked that any sale date be post-

poned to a date after the scheduled trial date of July 17,1989; stating that this would allow an opportunity for my lien to be established and then I would have the additional option of reinstating the Loan.

11. Thereafter, I was told by representatives of Imperial that as a matter of policy, I would not be provided with a copy of the lenders foreclosure guaranty which I had requested; and I was also told that Imperial had been contacted by many individuals who wanted to buy the property; it was described as "obviously a hot property".

12. In May 1989, I spoke with the Attorney for Imperial, again, expressing my concerns that any sale date be postponed beyond the trial date. I was told that no sale date had been set. We discussed a hearing in the Bankruptcy Court which was set for May 11, 1989,

which was a hearing to declare BFP, a Partnership, bankrupt, and he said he would contact me after the hearing on May 11, with regard to any sale date which was scheduled on the Imperial First Deed of Trust thereafter so that I would continue to have an opportunity to cure the default, if necessary.

13. I was unable to attend the May 11, 1989 hearing but was advised by BFP Partnership representatives that the attorney for Imperial who was present at the hearing stated that no sale would be scheduled until after the July 17, 1989 trial date and I advised BFP of the statements which had been made to me as set forth hereinabove.

14. I was told by a real estate broker who was present at the hearing with whom I discussed the matter, that her understanding of the statements which she had heard the attorney for Imperial

make were that the sale would not be scheduled until after the trial date.

15. Late Thursday, July 13, 1989, I received a call from the real estate broker who had been at the May 11, 1989 hearing who asked me of I knew anything about a sale of the subject property. She was upset because she had a cash buyer who had been trying to buy the property and was prepared to bid at any sale. Her client had been actively pursuing purchase from all the litigants in the trial which was scheduled on the title and had been shown the house by me on several occasions as I had retained possession during the litigation. This is the first notice I had received any anyone that a scheduled sale date had been set for July 12, 1989.

I declare under penalty of perjury according to the laws of the United States and the State of California that

the foregoing is true and correct.

Executed this 15th day of May 1990 at Newport Beach, California.

/s/ Sheldon L. Foreman
SHELDON L. FOREMAN

[PROOF OF SERVICE OMITTED IN PRINTING]

TRANSMITTAL LETTER dated May 30, 1990,
BAP TO DISTRICT COURT, BAP NO. CC-90-1220
United States Bankruptcy Appellate Panel
of the Ninth Circuit
U. S. Court of Appeals Federal Building
125 South Grand Ave., P. O. Box 91510
Pasadena, California 91109
FTS 961-7906
Telephone: (818) 405-7906

May 30, 1990

Leonard A. Brosan
U.S. District Court
526 Federal Building
34 Civic Center Plaza
Santa Ana, CA 99992701

Re: BAP No. CC-90-1220 BFP, a partnership
Bankruptcy No(s). SA-89-06771 JR
Adversary No(s). SA 89-0977 JR

A party to the appeal has timely filed an objection to the disposition of this matter by the Bankruptcy Appellate Panel. Consequently, this appeal is herewith

transferred to your court pursuant to Paragraph 3(b) of the Judicial Council Order Establishing the Bankruptcy Appellate Panel.

Sincerely,

Jed G. Weintraub
Panel Clerk

By: Vicky Jackson
Deputy Clerk
District Court
Bankruptcy Court
Woolsey
Sment
Caroom
Marquis

DECLARATION OF SHELDON L. FOREMAN

* * *

UNITED STATES BANKRUPTCY COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re:	CASE NO. SA 89 06771 JR
BFP, a Partnership,	Adv. No. SA 89-0977 JR
Debtor.	Chapter 11
BFP, A Partnership,	DECLARATION OF SHELDON L. FOREMAN
Plaintiff,	
vs.	* * *
IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation;	
Defendants.	

I, SHELDON L. FOREMAN declare and state as follows:

1. As to the following facts, I know them to be true of my own personal knowledge, and if called upon to testify herein, I could and would testify compe-

tently to those facts:

2. From 1974 until August 25, 1987, my wife, Ann Fant Foreman and I were the owners of the real property described generally as 225 Via Genoa, Newport Beach, California (hereinafter referred to as the "Subject Property").

3. In late November 1986, Frank E. Barton offered to purchase the Subject Property by putting together a partnership composed of his son, Russell J. Barton and Donald W. Deitz or some other business acquaintance. I was told at that time by Frank E. Barton that he and Russell J. Barton would both contribute their services for remodeling the Subject Property and thereafter market the Subject Property at an increased price sharing the profits from sale with Mr. Deitz, who would lend his financial strength as his investment to the partnership. Frank E. Barton acted as agent

for the partnership, with the consent and approval of both Russell J. Barton and Donald W. Deitz which consent was expressed to me on several occasions by Russell J. Barton and on at least one occasion by Mr. Deitz.

4. An escrow for the sale of the Subject Property was opened at Cress Escrow as No. 784587-TW and escrow instructions dated March 6, 1987 were signed by us with Donald W. Deitz (hereafter referred to as Deitz) named as Buyer.

5. In May or early June of 1987, Frank DE. Barton told me that Deitz was not able to qualify for their intended loan and requested that we consent to the substitution of Wayne L. Pedersen, as named Buyer in the same escrow instead of Donald W. Deitz.

6. I was told by Frank E. Barton in the presence of Russell J. Barton and

PUBLISHER'S NOTE

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the substitution of Wayne L. Pedersen into the escrow as Buyer, which superseding escrow instructions were dated August 3, 1987.

9. Just prior to the close of escrow, Randy Jones, on behalf of Wayne L. Pedersen, asked that the escrow be amended to include the name of his wife, Marlene M. Pedersen, and on or about August 19, 1987, Randy Jones and Frank E. Barton agreed in my presence that the terms of the partnership would be immediately reduced to writing and would include Marlene Pedersen; be dated August 26, 1987; be entitled B.F.P., a General partnership; and that the promissory note of the partnership would be issued to my wife and myself in the amount of $200,000 (the agreed amount of the loan which we were making available to the partnership) secured by a deed of trust recorded as a lien against the Subject Property, junior

only to the deed of trust in favor of Loan Market Services. Said promissory note and deed of trust were dated August 26, 1987, and the deed of trust was recorded on September 16, 1987 (hereinafter referred to as the "Foreman Deed of Trust).

10. Frank E. Barton told me that the Partnership Agreement was signed by Russell J. Barton prior to August 25, 1987, the escrow closing date, and delivered to the Pedersens by Randy Jones for signature.

11. The Deed from Wayne L. Pedersen and his wife to the partnership was prepared by the Escrow company, dated August 26, 1987, but approved by us prior to August 25, 1987 at the escrow office.

12. On or about September 29,1987, Pedersen conveyed the Subject Property to Off-Road Vehicles Recreation & Family Campground, Inc. (hereinafter "Off-Road")

claiming that the Foreman Deed of Trust was void and that Pedersen and not the partnership was the owner of the Subject Property.

13. On or about October 27, 1987, Frank and Russell Barton for the Partnership agreed to file a Complaint against Pedersen and Off-Road and to pursue litigation to validate the Foreman Deed of Trust; and to make us whole as to any damages which we incurred resulting from the actions of Pedersen and Off-Road. We agreed that the Partnership should retain its interest in the Subject Property and signed a letter waiving any conflicts of interest in order that attorney Roy B. Woolsey might represent the partnership and my wife and myself in the litigation.

14. The Foreman Deed of Trust was the subject of litigation in Orange County Superior Court Case No. 54 16 04, entitled B.F.P., a Partnership, . . .

Sheldon L. Foreman and Ann Fant Foreman, Plaintiffs vs. Wayne L. Pedersen, Marlene M. Pedersen, et al., Defendants. Said case was heard on July 17, 1989, in Department 91 of said Court and resulted in Judgment for the Plaintiffs.

15. I was in possession of the Subject Property at all times through and including the date of trial and until the locks were changed without my consent by the purchasers at foreclosure sale on the First Deed of Trust. I continued to show the property for the Partnership to the many interested buyers who were making offers to the Partnership in excess of $625,000 in cash; one of these was the person who purchased the property for $660,000.00 from the purchasers at the foreclosure sale.

I swear under penalty of perjury under the laws of the United States and the State of California that the forego-

ing is true and correct.

Executed this 7th day of June, 1990 in Newport Beach, California.

/s/ Sheldon L. Foreman

STATEMENT CONCERNING MINUTES OF COURT FOR JUNE 18, 1990

The minutes of court are not in the court file and we have been unable to locate the same. We verily believe that the abbreviated entry which appears in the docket entries hereinabove in this Appendix accurately reflects a statement contained in the minutes.

* * *

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re BFP, a Partnership, Debtor.	Bk. No. SA 89-06771 JR Adv. No. SA 89-0977 JR Chapter 11
BFP, a Partnership, Plaintiff, vs. IMPERIAL SAVINGS & LOAN ASSOCIATION, a California corporation; Defendant.	ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT IMPERIAL SAVINGS Continued Hearing -- Date: June 18, 1990 Time: 3:30 p.m. Place: U.S. Bankruptcy Court 34 Civic Center Plaza Santa Ana, CA Courtroom 520

Movant's Motion for Summary Judgment came on regularly for hearing on June 18,1990, at 3:30 p.m., before the Honorable John Ryan. Movant/Defendant IMPERIAL SAVINGS & LOAN ASSOCIATION appeared by and through its counsel of record, Mary C. Caroom, Esq., of the Law Offices of Edward G. Schloss. Debtor BFP, a

Partnership appeared through its counsel, Roy Woolsey, Esq.

The Court, having heard the arguments presented, the Court records and files, the Findings of Fact and Conclusions of Law filed concurrently herewith, and with good cause appearing therefor, makes its Order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Movant/Defendant IMPERIAL SAVINGS & LOAN ASSOCIATION's Motion for Judgment on the Pleadings and/or for Summary Judgment is GRANTED.

DATED: 10 JUL 1990

/s/ JOHN E. RYAN
UNITED STATES BANKRUPTCY JUDGE

[NO PROOF OF SERVICE ATTACHED]

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. 92-1370

BFP, Petitioner

v.

Resolution Trust Corporation,

as Receiver of

Imperial Federal Savings Association, et al.

ORDER GRANTING CERTIORARI.

Filed May 24, 1993.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

May 24, 1993

(7)

Supreme Court, U.S.
FILED
JUL 9 1993
OFFICE OF THE CLERK

NO. 92-1370

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

RESOLUTION TRUST CORPORATION as Receiver of IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER BFP ON THE MERITS

ROY B. WOOLSEY
Counsel of record for
Petitioner BFP, a Partnership
113 Via Venezia
Newport Beach, CA 92663
(714) 673-3731

Petition for Certiorari filed February 16, 1993

Certiorari Granted May 24, 1993

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

[RULE 24.1(a)]

The questions presented for review are:

1. Does the price received at a non-collusive regularly conducted foreclosure sale establish irrebuttably the reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A)?

2. Does mere compliance with state laws on foreclosure prevent avoidance in bankruptcy of a non-collusive foreclosure sale as a sale for less than reasonably equivalent value under 11 U.S.C. Section 548(a)(2)(A)?

3. Does the requirement in 11 U.S.C. Section 548(a)(2) of reasonably equivalent value create a federal standard concerning the power of trustees and debtors in possession in bankruptcy to avoid pre-bankruptcy foreclosure sales?

LIST OF THE PARTIES

[RULE 24.1(b)]

All of the parties to the above entitled action are named on the cover of this brief in the name of the action.

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IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

RESOLUTION TRUST CORPORATION, as Receiver of IMPERIAL SAVINGS & LOAN ASSOCIATION; a California corporation; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendants

BRIEF OF PETITIONER BFP ON THE MERITS

Petitioner, BFP, a Partnership, respectfully submits the following as its brief on the merits.

CITATIONS OF OPINIONS AND JUDGMENTS BELOW [RULE 24.1(d)]

In re BFP (BFP v. Imperial Savings & Loan Association), 974 F.2d 1144, 92 CDOS 7674, 23 BCD 705, 27 CBC 2d 1417, CCH Bank. L. Rptr. paragraph 74837 (9th Cir. 1992). Also, Appendix to Amended Petition for Writ herein, page 1.

In re BFP (BFP v. Imperial Savings & Loan Association), 132 B.R. 748 (BAP 9th Cir. 1991). Also, page 49, Appendix to Amended Petition for Writ.

Other orders and judgments to be reviewed have not been published. They are:

Judgment, Court of Appeals for the Ninth Circuit, Appendix to Amended Petition for Writ, p. 24.

Order, Court of Appeals for the Ninth Circuit, Denying Rehearing filed and entered on 11-17-92, Appendix to Amended Petition for Writ, p. 26.

Bankruptcy Court Order Dismissing Debtor's Complaint to Declare Transfer of Real Property Null and Void, etc. filed 3-6-90 and entered 3-8-90, Appendix to Amended Petition for Writ, p. 28.

Bankruptcy Court Findings of Fact and Conclusions of Law Re Motion for Judgment on Pleadings and/or Summary Judgment Dismissing Complaint filed on 7-10-90, Appendix to Amended Petition for Writ, p. 33.

Order for Summary Judgment (J. A. p. 354).

District Court Decision Affirming Bankruptcy Court Order Dismissing Complaint filed 4-8-91, Appendix to Amended Petition for Writ, p. 41.

District Court Order Denying Rehearing filed 5-6-91, Appendix to Amended Petition for Writ, p. 44.

STATEMENT OF GROUNDS OF JURISDICTION OF THE UNITED STATES SUPREME COURT [RULE 24.1(e)]

The judgment sought to be reviewed was entered in the Court of Appeals for the Ninth Circuit on September 8, 1992. A petition for rehearing was filed timely on September 22, 1992 and denied on November 17, 1992 (J.A. pp. 16-17).

The 90th day from the denial of the petition for rehearing was February 15, 1993, a court holiday, and the last day for filing this petition was February 16, 1993. The petition for writ was filed on February 16, 1993.

The Supreme Court of the United States has jurisdiction as provided in 28 U.S.C. Section 1254(1) and the petition is timely as provided in Rule 13.1 and 13.4.

The jurisdiction of this Honorable Court is invoked on the grounds that:

The decision of the United States Courts of Appeal for the Ninth Circuit to be reviewed is in conflict with the decisions of the United States Courts of Appeal in five other circuits. It holds that the bid at a noncollusive foreclosure sale is irrebuttably presumed to be the reasonably equivalent value.

Also, the decision decides an important question of federal law which has not been, but should be, settled by this court. That question is: Can a trustee in a bankruptcy avoid a noncollusive foreclosure sale conducted in accordance with state law?

The decision interprets 11 U.S.C. Section 548 contrary to its plain, unambiguous language, contrary to the decisions of this Court on statutory interpretation.

The Bankruptcy Court had jurisdiction under 28 U.S.C. Section 1334 (b) of

the adversary proceeding. The Complaint sought to avoid a sale under 11 U.S.C. 548(a)(2).

The District Court had jurisdiction of the appeal from the Order of the Bankruptcy Court dismissing as to PAUL OSBORNE and other individual defendants under 28 U.S.C. Section 158(a) and Bankruptcy Rule 8001(a). The order of the Bankruptcy Court was entered on March 8, 1990, and the "Second Notice of Appeal" was filed on March 14, 1990.

The Bankruptcy Appellate Panel (BAP herein) had jurisdiction of the appeal from the Summary Judgment "or" Judgment on the Pleadings in favor of Imperial Savings & Loan Association under 28 U.S.C. Section 158(b) and Bankruptcy Rule 8002. That Summary Judgment was entered on July 10, 1990 and the Notice of Appeal was filed on July 20, 1990.

The Court of Appeal had jurisdiction

of the appeal from the District Court under 28 U.S.C. 158(d) and the appeal was timely under Rules of Appellate Procedure Rule 4(a) and (b) and Bankruptcy Rule 8015. The District Court's Decision was entered April 8, 1991. A Motion for Rehearing was filed on April 12, 1991, and the latter was denied by Order entered May 6, 1991.

The Court of Appeal had jurisdiction of the appeal from the BAP under 28 U.S.C. Section 158(d). The latter's Opinion was filed November 5, 1991 and the Notice of Appeal filed November 15, 1991. The Opinion of the BAP is an appealable order as provided in 28 U.S.C. Section 158 (a) and (b).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ETC. INVOLVED [RULE 24.1(f)]

The only constitutional provisions, treaties, statutes, ordinances and regu-

lations involved are quoted in the Appendix to Amended Petition for Writ, pp. 69-74. They are:

Article 1, Section 8, clause 4 of the United States Constitution gives the Congress power to enact bankruptcy laws.

11 U.S.C. Section 101(54), the second of two 54s referred to as [58](54), formerly (40), defines transfer.

11 U.S.C. Section 548(a)(2)(A), provides that the trustee in bankruptcy may avoid certain pre-bankruptcy transfers for less than reasonably equivalent value.

11 U.S.C. Section 1107, gives a Debtor in Possession the powers of trustee under the Bankruptcy Code.

STATEMENT OF THE CASE [RULE 24.1(g)]

A. PROCEEDINGS BELOW

Petitioner filed an adversary com-

plaint to avoid the sale on foreclosure of a trust deed held by Imperial Savings Bank, sued herein as Imperial Savings & Loan Association, herein referred to as Imperial. The bankruptcy court granted the motion of the individual respondents for dismissal for failure to state a claim upon which relief can be granted (J.A. p. 2 entry 2-6-90; p. 3 DN 14) and later granted the motion of respondent Imperial for summary judgment or judgment on the pleadings (J.A. p. 4 entry 6-18-90; p. 5 on 40). Intervening courts and the Court of Appeal affirmed.

B. FACTS

1. Allegations of the Complaint.

On November 25, 1989, petitioner, BFP filed its Petition for Relief Under Chapter 11 of the U. S. Bankruptcy Code (J.A. p. 26).

Within a year prior thereto, on July

12, 1989, real property of the petitioner was sold at a foreclosure sale (J.A. p. 59). The foreclosure sale was under a trust deed held by Imperial which secured a note in the original amount of $356,250.00 (J. A. p. 48). That trust deed was senior to a $200,000.00 trust deed held by Sheldon and Ann Foreman (J.A. p. 50).

At the sale, respondent OSBORNE and the other individual respondents, purchased the property for $433,000.00 (J.A. p. 60; Trustee's Deed on Sale shows the actual figure to be $433,600.00 [J.A. p. 232]) when its value was over $725,000.00 J.A. p. 59).[1]

---

1. Not in the record on the motion: public record of deed on resale shows documentary tax stamps indicating sale of $559,500.00 to $660,000.00 by deed dated December 21, 1989, recorded January 31, 1990 as Instrument No. 057406, Office of the Recorder, Orange County, California. The price was $660,000.00 (J. A. 351).

The Foremans owned the property (J. A. p. 43) and they, Barton and the Pedersens agreed to the sale to the Pedersens (J. A. p. 44) and they, Barton and the Pedersens agreed that the Pedersens give an option to Russell Barton. By an amendment, the Pedersens agreed to give the Foremans a trust deed for $200,000.00 instead of coins (J. A. p. 46), that the Pedersens and Russell Barton would form the partnership (J. A. p. 46) and the Pedersens deed the property to BFP (J. A. p. 47).

Pursuant to the agreements, a deed describing Pedersens as grantors and BFP as grantee was duly recorded (J.A. p. 49). As stated in 2 below, Wayne Pedersen had authority but not the written authority required under California law to cause his wife's name to be signed to the deed. However, thereafter, in breach of the agreements, they deeded it to

Off-Road Vehicles -- Recreation and Family Campground, Inc., Off-Road herein (J.A. p. 51).

Prior to the foreclosure sale, BFP, the Debtor, Sheldon Foreman, the junior lien holder, brought an action against Pedersens over title to the property. The foreclosure sale was originally set for December of 1988 and continued from time to time.

Sheldon Foreman and BFP requested respondent Imperial Savings & Loan, the beneficiary under the trust deed on which the foreclosure occurred, to defer the sale until after the state court determined title in the pending title action (J.A. p. 54). Mr. Foreman and BFP were informed that they would receive notice of the continued sale on foreclosure of a trust deed held by Imperial (J.A. p. 58) and requested notice of the continued sale date.

In December of 1988, an involuntary petition to adjudicate BFP insolvent was filed by Off-Road (J.A. p. 59). The petition by Off-Road showed the 1987 address of BFP, not a current address (J. A. pp. 53 and 55-56). Although Russell Barton, his counsel and counsel for Imperial appeared at the hearing at which the petition for involuntary bankruptcy was dismissed, no attempt was made to ascertain his correct address or send Imperial's motion for relief from stay to BFP at a current address or to its counsel (J. A. P. 55-57).

The only notice of the time and place of sale given was the statutory notice that a sale was to take place in 1988 and the oral pronouncements of continuances at the time and place set for the sale and continued sales (J.A. p. 59). The foreclosure sale occurred on July 12, 1989 (J.A. pp. 59-60).

2. Evidence of Quiet Title Action (BFP v. Pedersen) in Support of all Motions.

Respondents Osborne, et al. attached to their Motion to Dismiss and Imperial attached to its Declaration of Mary Caroom in support of its Motion for Summary Judgment a copy of the Tentative Decision and a copy of the Statement of Decision of the Superior Court in BFP v. Pedersen (J.A. pp. 252-281 and p. 315).

The Tentative Decision was that the Pedersens, Barton and the Foremans agreed to form a partnership (petitioner BFP) composed of Barton and the Pedersens, Marlene Pedersen did not sign the partnership agreement or the deed from the Pedersens to BFP, Wayne L. Pedersen had implied authority to sign her name but not written authority to make a deed on her behalf as required by California

statutes (J.A. pp. 254-255). That she was bound by the partnership contract and that their subsequent deed to Off-Road was a violation of the agreement and gave rise to a failure of consideration to the Foremans requiring rescission of Foreman's deed [to the Pedersens] and escrow instructions (J.A. p. 255).

It provided that "the Foremans were entitled to a decree quieting title to the subject real property against all named defendants, excluding Randy Jones." (J.A. p. 256). The Tentative Decision did not say that title be quieted against BFP. Again, at p. 257 the court said that the Foremans "are granted judgment of quiet title of the subject property against each of the defendants except Randy Jones" (J.A. p. 257).

The Statement of Decision by the court provided that "as to the issue of rescission between Sheldon Leroy Foreman

and Ann Fant Foreman, and defendants, Wayne L. Pedersen, Marlene M. Pedersen and Off-Road . . ., and Gary Dwight Henig of the deed" Foremans to Pedersen (J.A. p. 261-262) and the escrow instructions are rescinded (J. A. p. 261-263). The court said in its Statement of Decision that title should be quieted to the deed of trust and the real property "as against defendants" [not against plaintiff BFP, the petitioner designated] (J. A. p. 271). The court found that the Pedersens were not guilty of a fraud (J. A. p. 274).

3. The Judgment in the State Court (BFP and Foreman v. Pedersen).

Respondent Osborne et al in the Motion to Dismiss For Failure to State a Claim did not attach a copy of the state court judgment. Imperial did attach the same to its documents in support of its

Motion for Summary Judgment or Judgment on the Pleadings. In that judgment, the court ordered that plaintiffs Foreman have judgment that, "as between" Foremans and the Pedersens and Off-Road, the "deed" and escrow instructions be rescinded (J. A. p. 317-319).

It also ordered that "plaintiff B.F.P., Sheldon L. Foreman and Ann Fant Foreman are the sole owners of said real property in fee simple" (J. A. p. 319).

4. Declaration in Opposition to the Motion for Summary Judgment.

The second lienholder, Sheldon Foreman, had told Imperial that he would protect his interests but because of the title dispute did not want to do so in advance (J. A. p. 334). He reinstated the trust deed from default in 1988 (J. A. p. 335) and twice offered to purchase the trust deed from Imperial (J. A. p.

336-337). He had regularly contacted Imperial concerning the continuances of sale for a period of time (J. A. p. 336). In May of 1989 he was told by Imperial that no date had been set for the sale (J. A. p. 338) and he was told that he would be contacted about the sale date (J. A. p. 339). A broker's client had been attempting to purchase the property from the parties in the litigation (J. A. p. 340).

The Foremans owned the property from 1974 to August 25, 1987 (J. A. p. 345). Frank E. Barton offered to purchase the property and was trying to put together a partnership composed of a business acquaintance and Russell Barton, and that both Frank Barton and his son, Russell Barton, would contribute services in remodeling the property and then marketing it (J. A. p. 345). Wayne L. Pedersen was substituted in as the buyer and Frank

Barton and Russell Barton said that the specific partnership terms would be reduced to writing, that Russell Barton would be named as managing partner but Frank Barton would actually be conducting the affairs of the partnership (J. A. p. 348).

After Pedersens deeded to Off-Road (J.A. p. 349), Foreman and the Bartons agreed that a Complaint be filed against Pedersen and Off-Road to make the Foremans whole as to the damages they had incurred as a result of the action of Pedersen and Off-Road, they agreed that the partnership would retain its pursuit of the subject property and signed a letter waiving a conflict of interest in order that counsel might represent the partnership and the Foremans in the litigation (J. A. p. 350). The Foremans remained in possession pending remodeling and showed the property to persons inter-

ested in buying in excess of $625,000.00 (J. A. p. 351). One of those persons actually purchased the property from Respondent Osborne et al. (purchasers at the foreclosure sale) for the $660,000.00 (J. A. p. 351).

There was evidence that $11,784.27 over the amount due the holder of the first was never paid to the Debtor or the Foremans (J. A. p. 324).

A copy of the Motion for Relief From Stay on behalf of Imperial and the proposed Order Granting the Motion in the prior involuntary bankruptcy proceeding were mailed to the address shown on the involuntary petition by Off-Road in spite of the fact that the proposed order dismissing that involuntary petition showed as attorney for Barton, Roy B. Woolsey, and his address, and BFP's answer to the petition for adjudication showed its correct and current address

(J. A. p. 328). Yet, the fact that Imperial was seeking relief from stay in that proceeding was not brought to the attention of BFP, its partner, or the attorney for its partner (J. A. p. 328). The only asset of the partnership initially was the real property involved in this case (J. A. p. 330). The property was worth about $700,000.00 and yet on the foreclosure sale went for about $433,000.00 (J. A. p. 331) or $433,600.00. (J. A. p. 232).

SUMMARY OF ARGUMENT [RULE 24.1(h)]

The court of appeal held that the high bid at a regularly conducted noncollusive foreclosure sale established an irrebuttable presumption that the bid was the reasonably equivalent value (J.A. p. 23) and on that ground affirmed. The BAP repeated the rule of In re Madrid, 21 B.R. 424 (9th Cir. BAP 1982), aff'd on

other grounds (no transfer), 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U. S. 833, 83 L.Ed 66, 105 S. Ct. 125 (1984) that such a sale "establishes 'reasonably equivalent value' as a matter of law." (Appendix to Amended Petition for Writ, pp.54-55).

The 11 U.S.C. Section 548 makes no exception for mortgage foreclosures or trust deed foreclosures.

Where the plain language of a statute is clear, unambiguous and without a scrivener's error, there is no room for question as to its meaning and the court should not turn to legislative purpose, policy, history, or other extrinsic factors in interpreting a statute.

If the purpose or policy of the statute is relevant to a determination of what Congress intended, then the purpose and policy of the Bankruptcy Code is to bring property back into the estate for

the benefit of general creditors and even possibly for the benefit of the bankrupt himself; exempting foreclosure sales from the avoidance posers is contrary to that purpose or policy.

The questions presented for review as stated in the Petition for Writ and the Reply Briefs thereto appear to limit the scope of this review to the issues referred to above.

The Bankruptcy Court ruled in favor of the buyers, respondents Osborne, et al., squarely on the grounds that the bid price established a reasonably equivalent value and that a foreclosure is not a transfer. That court placed its holding on the summary judgment in favor of Imperial on the grounds that the bid price established the reasonably equivalent value and an interest in the property of the Debtor property was not transferred.

The Ninth Circuit Court held that the Debtor had an interest in the property which was foreclosed. This ruling should govern. If, somehow, that ruling is open to question, the Debtor had an interest of record in the property as grantee of Wayne Pedersen as to one-half of the property, a right as a co-tenant with the Foremans under the judgment quieting title, and an interest directly from the Foremans (page 11 above; J. A. pages 43 to 49 and 319).

The requirements in Section 548 of insolvency and time (one year) were not considered by any court below. Those facts were alleged in the Complaint and remain unchallenged. In any event, the facts will show that the Debtor met those requirements.

ARGUMENT [RULE 24.1(i)]

A. UNDER THE STANDARD OF REVIEW BY THIS COURT OF THE LOWER COURT DECISIONS, IN THIS CASE THERE IS NO SUBSTANTIAL FACT IN FAVOR OF RESPONDENTS.

In Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed.2d 80 (1957) in reversing a judgment on the pleadings, this Honorable Court said:

> "In appraising the sufficiency of the Complaint, we follow, of course, the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief."

The Ninth Circuit conformed to the foregoing in Kelson v. Springfield, 767 F.2d 651 (9th Cir. 1988) where it said:

> "A dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and is subject to de novo review . . . in reviewing such a dismissal we must accept all material allegations in the Complaint as true, and construe them in the light most favorable to the appellant . . . dismissal

> for failure to state a claim is proper only if it appears to a certainty that the plaintiff would be entitled to no relief under any stated facts that could be proved. . . ."

In reviewing a summary judgment, the Ninth Circuit ruled that the decision is reviewed de novo in In re Kirkland, 915 F.2d 1236, 1238, (9th Cir. 1990).

In Vette Co. v. Aetna, 612 F.2d 1076, 1077 (CA 8th 1980) in reversing a summary judgment the court said that the reviewing court ~~is~~ gives the party opposing the summary judgment (the Debtor):

> "the benefit of all reasonable inferences to be drawn from the fact disclosed in the pleadings and affidavits."

In accord: Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3rd. Cir. 1980).

As to both the dismissal and the summary judgment "or" judgment on the pleadings, the Court of Appeals considers

questions of law de novo applies to appeals from the Bankruptcy Court: In re Alcala, 918 F.2d 99, 103 and In re Arctic AirTemp. Inc., 68 B.R. 71, 74 (1986).

B. THE PLAIN UNAMBIGUOUS LANGUAGE OF 11 U.S.C. 548 INCLUDES FORECLOSURES IN THE AVOIDANCE POWERS.

The plain unambiguous language of 11 U.S.C. 548 makes it clear that the statute applies to nonc~~o~~onclusive mortgage foreclosure sales even if regularly conducted under state law. There is no need to look to the purpose of statute or the policy behind it.

At all times since 1978, 11 U.S.C. Section 548(a)(2)(A) and (a)(2)(B)(i) provides in plain language that a trustee may avoid

" 'any transfer'

of an interest of Debtor in

property,

made within one year before the date of the filing of the Petition,

if the Debtor . . . received less than a reasonably equivalent value in exchange for such transfer . . . and

was insolvent . . . or became insolvent as a result of such transfer . . . ."

Petitioner's contention is made clearer by the 1984 amendment to code section 548 which inserted (after "Debtor" and before the "received less than the reasonably equivalent value") the words "voluntarily or involuntarily" and added to the definition of transfers in 11 U.S.C. 101 "foreclosure of Debtor's equity of redemption."

The Code does not except mortgage foreclosures. The amendment in 1984 to

Section 548 to include "involuntary" transfers and the addition of foreclosure of an equity of redemption to the definition of transfers in Section 101 make it even clearer.

In 1984, Sections 101 and 548 were amended to change the rule announced in In re Madrid, Madrid v. Lawyers Title Ins. Corp., supra. In that case, the BAP held that at a noncollusive regularly conducted sale the high bid was the reasonably equivalent value and the Court of Appeal held that a foreclosure sale was not a transfer.

The constitutional statutes must be given effect according to the language thereof. The intent of Congress is to be determined from the face of a clear and unambiguous statute.

In Union Bank v. Wolas, 502 U.S. ____, 116 L. Ed.2d 514, 112 S. Ct. 527, 534, 22 BCB 574, 25 CDC 2d 1011, CCH

Bankr. L. Rptr. paragraph 74,296A, this Honorable Court said:

> "It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a court of appeals), with respect to a statute utterly devoid of language that could remotely be thought to distinguish between long-term and short-term debt. Since there was here no contention of a 'scrivener's error, producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable."

In Toibb v. Radloff, 501 U.S. ____, 115 L.Ed. 2d 145, 152, 111 S.Ct. 2197, 2200 (1991), in holding that a person without a business could file under Chapter 11 of the Bankruptcy Code, the court said:

> "In our view, the plain language of the Bankruptcy Code disposes of the question before us . . . Congress knew how to restrict recourse to the avenues of bankruptcy relief, it did not place Chapter 11 reorganizations beyond the reach of a non-business debtor." (p. 151)

> "First, this Court has repeated with some frequency: 'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." Blum v. Stenson, 4645 U.S. 886, 896, 79 L. Ed. 2d 891, 104 S.Ct. 1541 (1984). The language of Section 109 is not unclear. Thus, although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here." (p. 152)

In accord: United States v. James, 478 U.S. 597, 92 L.Ed.2d 483, 493, 106 S. Ct. 3116.

In United States v. Turkette, 452 U.S. 576, 69 L. Ed.2d 246, 101 S. Ct. 2524 (1981), in holding that enterprise and the racketeer influence and corrupt organizations part of the organized crime control act of 1970 included illegitimate enterprises the court said:

> "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'. Consumer Product

Safety Comm'n. vs. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed.2d 766, 100 S. Ct. 2051.

The Ninth Circuit candidly acknowledged that both Durrett and the Seventh Circuit's holding in In re Bundles, 856 F.2d 815, 18 BCD 554, CCH Bankr.L.Rptr Section 7246 (7th Cir. 1988), derived from a "plain-language interpretation of Section 548(a)(2)." In re BFP, 974 F.2d at 1148. Indeed, the Court recognized the Seventh Circuit's conclusion that "[g]ranting an irrebuttable presumption of reasonable equivalence . . . effectively creates a judicial exception to the trustee's avoiding powers. . . ." In re BFP, 974 F.2d at 1148.

In holding that a mortgage foreclosure can be avoided under 11 U.S.C. Section 548, in First Fed Sav. & Loan Ass'n Bismark v. Hulm. (In re Hulm), 738 F.2d 323, 327 (8th Cir. 1984) cert. denied, 469 U.S. 990 105 S.Ct. 398, 83

L.Ed 2d 331 (1984), the court wisely observed:

> "the Bankruptcy Code provisions are clear . . . and direct the result we have reached. Hence, policy considerations cannot affect the outcome of the case but must be addressed, if at all, by Congress."

In the Matter of Bundles, 856 F.2d 815, 821 (7th Cir. 1988) the Court said it began its analysis with the language of the statute which provides

> ". . . a transfer of the debtor's property may be set aside if it is transferred for less than a reasonably equivalent value.
>
> "It makes no distinction between sales that do and sales that do not comply with state law. If we take the statute at face value, we must conclude that its unambiguous language requires a reviewing court to make an independent assessment of whether evidence of reasonable equivalence was given."

C. IF THE PURPOSE OF 11 U.S.C. 548 IS TO BE CONSIDERED, INCLUSION OF FORECLOSURES IS CONSISTENT

AND EXCLUSION OF FORECLOSURES INCONSISTENT WITH THE PURPOSE.

If the court is going to look at the purpose or the policy of the statute, the court should take into account that policy and the purpose of 11 U.S.C. Section 548 is to recover property for the estate of the bankrupt, it is not to encourage mortgage foreclosure sales. The Ninth Circuit Court stated that adopting the irrebutable presumption of reasonable equivalence would undermine the trustee's power to recover lost equity "which is the purpose of Section 548 avoiding powers,. . ." (In re BFP, 974 F.2d 1144, 1148; Appendix to Amended Petition for Writ, p. 20).

If the court is to consider the purpose of the statute at all, the purpose supports petitioner's position.

The Ninth Circuit Court referred to Professor Scott B. Ehrlich's article as

support for its view that it makes little sense to interpret 11 U.S.C. 548 in a way that will likely discourage healthy foreclosure bidding (Appendix to Amended Petition, pp. 21-22). The court entirely ignored Ehrlich's comments in the same article to the effect that the sufficiency of state procedures would require a case by case analysis but the inquiry into foreclosure procedures would generate rules of law upon which future market participants can rely. He said that if state procedures are upgraded to market the property effectively and to increase the number of prospects purchasing at the sale, the value paid to the highest bidder will be closer to the non forced sale fair market value of the property, thus reducing the justification for avoiding the sale of a fraudulent conveyance (Appendix to Amended Petition, p. 79-80). He said federal courts should

enforce 548 until state procedures are revamped. (Appendix to Amended Petition for Writ p. 81).

Along this line, Frank R. Kennedy in Involuntary Fraudulent Transfers, published in Volume 9, Cardoza Law Review, December 1987, p. 542, 578-580 said:

> "In the meantime, the vulnerability of an involuntary transfer to avoidance as a constructive fraud should encourage lienor or lessor to exercise care to maximize the consideration passing or to minimalize the loss resulting to the debtor to the enforcement of rights on default.[196] The plethora of successful attacks on involuntary transfers as constructive fraud has focused needed attention on the unsatisfactory state of procedures for lien enforcement and lease termination. If the critics and supporters of Durrett can join in efforts directed toward the improvement of these procedures, the final outcome of the preoccupation with the Durrett doctrine will surely be a serendipitous benefit to debtors and creditors . . ."

Said footnote 196 states:

> "The argument that the application of the Durrett doctrine will

> encourage bidders at foreclosure or execution sales to lower their bids attributes to them a perverse incentive to incur the risk of avoidance of their purchases."

Randolph J. Haines, "Ninth Circuit Rejects Durrett" April 1993, 93-No.4, issue of Norton Bankruptcy Law Adviser, pp. 9-10, says of this problem:

> "The Court cites Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933 (1985), for the argument that the possibility of upsetting a foreclosure sale would cause such market uncertainty as to chill the bidding. In re BFP, 974 F.2d at 1148. In fact, however, Professor Ehrlich rejected the BAP's Madrid result for two carefully analyzed reasons. First, the author argued that 'the long history of fraudulent conveyance provisions strongly supports an interpretation of section 548(a)(2) that permits the trustee to recapture such a loss." Ehrlich, 71 Va L.Rev at 935-936. Second, Professor Ehrlich established that "forced sales do in fact bring less than fair retail market value for the property and thus constitute improvident transfers from the perspective of the debtor's unsecured creditors.' Ehrlich, 71 Va L.Rev at 958. Indeed, Professor Ehr-

lich astutely observed that the proliferation of antideficiency legislation attests to recognition by state legislatures that foreclosure sales prices to not reflect reasonably equivalent values, belying the comity argument. Ehrlich, 71 Va L. Rev. at 959. Consequently, Professor Ehrlich argued for improvement in foreclosure sale procedures, such as advertising and providing time to obtain financing, rather than demanding cash within 24 hours. But he concluded that

> 'Until state foreclosure pro proceedings are upgraded to produce a value close to the fair value of the property under forced sale conditions, the purpose and function of section 548(a)(2) is precisely to allow the trustee to pierce the finality of the foreclosure sale and determine, under the circumstances, whether a reasonably equivalent value has been received for the debtor's interest.'

Ehrlich, 71 Va L. Rev. at 962.

In short, the Ninth Circuit's sole authority for the Madrid result persuasively demonstrated its fallacies. Instead, Professor Ehrlich's article provides strong support for the Bundles approach (The Seventh Circuit decision subsequent to the article), which encourages improvement in the foreclosure procedures by preserving a sale below

> appraised value only if adequate advertising had been done. See Haines, Norton Bankruptcy Law Adviser, Court Proposes Novel Solution to Durrett, 1989--No. 10.

As said by Philip Schuchman, Data on Durrett, 9 Cardoza Law Review 605:

> ". . . There is very little evidence in the sources cited for these assertions about the harmful effects of statutory redemption under state laws. A 1958 article in the Business Lawyer (the American Bar Association section journal) states that 'the facts . . . demonstrated by actual experience, show the following:
> (1) Only 0.927%, or less than 1%, of properties foreclosed is ever redeemed; . . .
> (3) In 99.3% of "public" sales, the mortgagee is the buyer' . . . (at pp. 616-617)
>
> ". . . These critics [of the power to avoid a trustee's sale under 548] cite almost no empirical evidence on the effect of statutory redemptions under state law, and what little there is largely dates from the Great Depression of the 1930's . . . It may be that, even now, state redemption statutes are little-used by mortgagors who have defaulted and where homes have been foreclosed. But that does not prove at all that bid prices are lower because of state re-

demption laws." (at page 618)

D. MOST COURTS OF APPEAL HAVE DECIDED THE ISSUE IN ACCORDANCE WITH PETITIONER'S CONTENTIONS AND THEIR REASONING IS PERSUASIVE.

The granddaddy of the cases is, of course, Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980), decided under the Bankruptcy Act, Section 67(d) (pre-1978 effective date of the Bankruptcy Code) which provided for avoiding transfers without fair consideration. It held that the sale be set aside and in dicta, by implication, established the so-called 70% rule.

In Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir.) cert. denied, 454 U.S. 1164, 102 S.Ct. 1 1038, 71 L.Ed.2d 320 (1981) applied the rule under the Bankruptcy Act.

The 5th Circuit held that that was

still the rule even under the Bankruptcy Code: Federal Deposit Insurance Corp. v. Blanton, 918 F.2d 524, 537, fn. 7 (5th Cir. 1990).

In re First Savings & Loan Ass'n Bismarck v. Hulm (In re Hulm), 738 F.2d 323, 327 (8th Cir. 1984) cert. denied, 469 U.S. 990, 105, S. Ct. 380, 398, 83 2d 331 (1984) is quoted above.

In the Matter of Grissom, 955 F.2d 1440 (11th Cir. 1992), in reversing a judgment avoiding the foreclosure sale, the Eleventh Circuit Court adopted a rule in conflict with the decision to be reviewed and remanded for further consideration by the trial court (in accordance with the rule said circuit court adopted). The court said that we must endeavor to prevent foreclosure sales which unnecessarily deplete the resources of a bankruptcy estate (p. 1442), and:

> "one factor in rebutting the presumption of reasonableness is

> . . . the foreclosure sale achieved less than 70% of the property's markup value . . ., courts should consider whether or not the foreclosing party obtained a fair appraisal, the extent to which advertised, and the competitive conditions surrounding the sale", (p. 1446)

Bundles v. Baker, (In re Bundles), 856 F.2d 815 (7th Cir. 1988). There the court said:

> "Accordingly, we must reject the view that state law, either directly or as the federal rule of decision, should determine the outcome of a bankrupt's complaint under section 548(a)(2)(A). Here, Congress has set forth a federal standard. We must give effect to that congressional will, however ambiguous its manifestation." (p. 822)

See also Barrett v. Commonwealth Federal Savings Ass'n, 939 F.2d 20, 23-25 (3rd Cir. 1991) saying that there was no irrebuttable presumption but finding reasonably equivalent value in that case and reversing the order avoiding the sale.

In Judge Volinn's dissent in BAP decision in this case cited several

decisions of lower courts in other circuits which are contrary to the decision under review (App. p. 46).

It is difficult to reconcile the decision under review with In re Ehring, 900 F.2d 184 (9th Cir. 1990). There the Court of Appeal ruled that a mortgage foreclosure sale was a transfer for the purposes of 11 U.S.C. 547 (d) on avoiding pre-petition preferences. There, at page 187, the court stated that in 1984 Congress amended the definition of "transfer" to include the "foreclosure of the debtor's equity of redemption," 11 U.S.C. Section 101[58](54) and "foreclosure is a transfer for purposes of fraudulent conveyances (11 U.S.C. 548)". Thus, in Ehring the 1984 amendments were applied;

An amendment to Sec. 548 to provided an irrebuttable presumption that the price bid was reasonably equivalent was

proposed and not adopted as said in Bundles v. Baker, supra. The decision to be reviewed seeks to insert such a provision in the statute.

The Third, Fifth, Seventh, Eighth and Eleventh Circuits have construed the statute in accordance with our contention.

The only cases decided by a court of appeal to the contrary are the case under review, BFP vs. Resolution Trust Company and the decision in the Matter of Winshall's Settlors' Trust, 758 F.2d 1136 (6th Cir. 1985) involving a transfer that occurred in 1983 before the 1984 amendments to 11 U.S.C. Sections 101 and 548.

E. A FORECLOSURE SALE IS A TRANSFER.

This issue may be reviewable under question two stated in the Amended Petition for Writ. On the motion to dismiss, the Bankruptcy Court said it was bound by

Madrid, supra, (bid on the foreclosure establishment of the reasonably equivalent value) and In re Ehring, 91 B.R. 897 (9th Cir. BAP 1988).

In Ehring the lead opinion did, in holding that a mortgage foreclosure avoided as a preference to a creditor under 11 U.S.C. Section 547, say that there was no transfer and that the amendments to the Bankruptcy Code did not overrule the Madrid case in that respect. Judge Jones, in a separate opinion, concurred in the result saying that the elements of preference were not present. Judge Mooreman dissented saying that one of the purposes behind the establishment of the Bankruptcy Code was to provide means to marshal a debtor's assets and allow for the regular distribution among all creditors (p. 903). He also said on said case that the bankruptcy amendments, including the Federal Judgeship Act of

1984, modified the Bankruptcy Code definitions of transfer to expressly include "foreclosure of debtor's equity of redemption." He went on to say that he felt that the amendments had the effect of overruling Madrid and "to hold otherwise would be to interpret the express statutory language in a manner inconsistent with the purpose of the Bankruptcy Code."

In 900 F.2d 184 (9th Cir. 1990) the court of appeal affirmed the judgment in Ehring for lack of a preference, but expressly said that the foreclosure sale is a transfer. At page 187, the court stated that Congress amended the definition of transfer to include foreclosure of the debtor's equity of redemption and "foreclosure is a transfer for the purposes of fraudulent conveyances (11 U.S.C. 548)."

Each case cited as holding that a

foreclosure sale does not establish reasonably equivalence and so is subject to the power of the avoidance under 548 implicitly, if not expressly, holds that a foreclosure is a transfer.

F. BFP IS ENTITLED TO THE EXCEPTION RECOGNIZED IN THE MADRID DECISION

~~/RM41~~

In this case the allegations and evidence showed that the sale had been continued and the holder of the second trust deed requested notice and was not given notice (Br. for Appellant in 91-56480, pp. 14-15, Br. for Appellant in 91-55632, p. 7, lines 11-25)

Even Madrid, 21 B.R. 424, 427 (1982) said:

" '[T]here must in addition [to inadequacy of price be]

> proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price.'".

The foregoing is not limited to state law rights but is interpretation of a federal statute and a federal standard. In In re Tome, 113 B.R. 626 (Bktpcy C.D. Cal. 1990) the court wisely observed that after continuances of sale noticed as required by state law, the bankruptcy court could require notice in addition to notice required by state law.

G. RELIEF OTHER THAN RESTORATION OF THE PROPERTY IS AVAILABLE.

Resale (not in the record on the motion to DISMISS) presents no problem.

11 U.S.C. Section 550(a) provides that property or its value may be recovered; In re Lindsay, 98 B.R. 983, 992-3, (Bkrtcy. S.C. Cal. 1989), In re Coleman, 21 B.R. 832, 836-7 and In re Nance, 26

B.R. 105 (Bkrtcy. S.D. Ohio 1982) so held

H. THE DEBTOR HAS AN INTEREST IN THE PROPERTY WHICH WAS TRANSFERRED.

This is outside the stated questions to be reviewed. The Circuit Court of Appeals ruled in favor of petitioner on this point, and the facts in its opinion and hereinabove ~~to~~ support that decision and it appears that further argument on it is unnecessary.

CONCLUSION

The dismissal of the case for failure to state a claim should be reversed and the Bankruptcy Court should be ordered to deny the motion for dismissal.

The judgment granting the summary judgment or motion on the pleadings for Imperial likewise should be reversed and remanded to the trial court to deny the

motion.

Alternatively, the remand could be to the Ninth Circuit Court with instructions to make an order in accordance with the decision of this Honorable Court.

The issue of title was decided by the Ninth Circuit Court in favor of petitioner and that issue has not been stated to be a question to be reviewed in any petition or response. This court could remand it for further consideration of that issue but that issue has been decided and no need to undo it.

Dated: July 7, 1993.

RESPECTFULLY SUBMITTED,

_____
ROY B. WOOLSEY
Attorney for Petitioner

D114:BFPSC.P93

(13)

No. 92-1370

Supreme Court, U.S.
FILED
AUG 20 1993
THE CLERK

In The

Supreme Court of the United States

October Term, 1993

IN RE: BFP, a Partnership,

Debtor.

BFP, a Partnership,

Petitioner,

vs.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ AND RICHARD MARCZ

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QUESTION PRESENTED FOR REVIEW
(RULE 14.1(a))

Respondents believe that the only proper question for review is:

Did the United States Court of Appeals for the Ninth Circuit err in concluding that "the price received at a noncollusive, regularly conducted foreclosure sale establishes irrebuttaly reasonably equivalent value under 11 U.S.C. § 548(a)(2)(A)"?

LIST OF ALL PARTIES
(RULE 24.1(b))

Petitioner:

BFP, a Partnership,

Respondents:

Paul Osborne; William Little; Dennis Roy; Arthur Ritz; Jose Cruz; and Richard Marcz.

Respondent:

Resolution Trust Corporation as Receiver of Imperial Federal Savings Association.

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No. 92-1370

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October Term, 1993

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ AND RICHARD MARCZ

OPINIONS BELOW

In Re BFP, 974 F.2d 1144 (CA9 1992) (*See* Appendix to Amended Petition herein, p. 1). *In Re BFP*, 132 B.R. 748 (9th Cir. BAP 1991) (*See* Appendix to Amended Petition, herein, p. 49).

STATUTE INVOLVED

The only real statute involved in the decision of the Ninth Circuit Court of Appeals, and pertinently involved herein, is: 11 U.S.C. § 548(a)(2)(A). (*See* Appendix to Amended Petition, p. 69-70).

STATEMENT OF THE CASE

Petitioner has omitted several important substantive and procedural facts from its statement.

Petitioner was first a debtor in a Chapter 11 bankruptcy case (involuntary) on December 31, 1988 (Joint Appendix ("J.A."), pp. 23-25).

Imperial Federal Savings Association ("Imperial") (now represented herein by Respondent The Resolution Trust Corporation) ("RTC") held the most senior deed of trust on Petitioner's real property (Petitioner's Brief, p. 10). Because Petitioner had defaulted on its deed of trust payments, Imperial requested, and obtained, relief from the automatic stay, and permission, from the United States Bankruptcy Court to proceed with its pending non-judicial foreclosure and a trustee's (foreclosure) sale (J.A. p. 23 and 25).

Then, prior to formal entry of an order on Imperial's behalf, Petitioner voluntarily requested an order dismissing the Chapter 11 bankruptcy case. The order was entered, and the bankruptcy case dismissed, on June 14, 1989 (J.A. p. 24).

On July 12, 1989 — almost one month after the first bankruptcy case was dismissed, and over 3 1/2 months before the instant bankruptcy case was commenced — the real property was

sold by Imperial at a trustee's (foreclosure) sale.[1] Respondents Paul Osborne, et al., ("Respondents") were the third-party purchasers, paying $433,600 cash. At the time of the sale, the amount owed to Imperial was only $421,815.72 (J.A. pp. 232-236). The surplus proceeds were made available to the junior trust deed holders, whose $200,000+ junior deed of trust was extinguished by Imperial's foreclosure sale. *See* Calif. Civil Code § 2924k(a)(3).

A Trustee's Deed Upon Sale was executed and delivered on July 18, 1989, at which time title to the property became vested in Respondents (J.A. p. 235). *See* Calif. Civil Code §§ 1091, 1053, 1054. On July 21, 1989, the Trustee's Deed was recorded, pursuant to California law, with the official records of Orange County.

Two state court actions were then filed, by Petitioner and others, challenging the trustee's (foreclosure) sale (J.A. pp. 140-170). The first action was voluntarily dismissed by Petitioner and others. On October 25, 1989, two weeks after Respondents filed a demurrer challenging the sufficiency of Petitioner's complaint in the other action — and only 2 days before the hearing on Respondents' demurrer (J.A. pp. 175-201) — Petitioner filed this, its second, Chapter 11 bankruptcy case (J.A. p. 26).

On or about November 24, 1989, Petitioner filed its adversary

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1. Although Petitioner, again, refers to facts regarding "notice" (*see* Petitioner's Brief, pp. 13-14), Petitioner's adversary complaint did not seek to have the trustee's (foreclosure) sale set aside based on any lack thereof. Petitioner's adversary complaint did not allege any failure to comply with the strict notice requirements of California statutes. Petitioner expressly admitted to the Bankruptcy Court that it could not allege or prove any failure to comply with any requirement mandated by the comprehensive California statutes governing foreclosures. Petitioner received all the notice(s) required by law. Even if it had not, the foreclosure sale could not have been set aside as to Respondents pursuant to well-settled California law. *See* Point VII *infra*.

complaint and challenged the trustee's sale, and commenced the proceedings directly below (J.A., pp. 2-5, 41-62).

On December 14, 1989, the United States Bankruptcy Court vacated the automatic stay in Petitioner's Chapter 11 case "for all purposes" as to Respondents.[2] (J.A. pp. 102-104).

On March 6, 1990, after Petitioner admitted that it could not prove any non-compliance with California foreclosure statutes, the United States Bankruptcy Court, on Respondents' motion pursuant to Rule 12(b)(6) F.R.C.P. and Federal Bankruptcy Rule 7012(b), dismissed Petitioner's complaint as to Respondents (Appendix to Petitioner's Amended Petition, pp. 28-32). That dismissal was subsequently affirmed by both the United States District Court for the Central District of California and the Court of Appeals for the Ninth Circuit (*In re BFP,* 974 F.2d 1144 (CA9 1992) "Ninth Circuit's decision below"). (Appendix to Petitioner's Amended Petition, pp. 41-43, 1-23) (Petitioner's complaint against Imperial proceeded to a summary judgment in Imperial's favor. That judgment was subsequently affirmed by both the United States Bankruptcy Appellate Panel for the Ninth Circuit (*In re BFP,* 132 B.R. 748 (9th Cir. BAP 1991) and the Court of Appeals for the Ninth Circuit (*In Re BFP,* (9th Cir. 1992), *supra).* Pursuant to an order filed on November 17, 1992, Petitioner's petition to the Ninth Circuit for rehearing was denied, and its suggestion for rehearing *en banc* was rejected. No active circuit judge requested a

2. While Petitioner refers to a January 1990 resale of the property (*see* Petitioner's Brief, p. 11, fn. 1), no evidence of any resale or the deed referred to was *ever* presented to the Bankruptcy Court or District Court below, nor properly presented to the Court of Appeals ("J.A." pp. 1-10). Indeed, as Petitioner only sought to recover the property (J.A. pp. 61-62) and never sought relief pursuant to 11 U.S.C. § 550 (J.A. pp. 41-62), this proceeding is moot. *Heitmuller v. Stokes,* 256 U.S. 359, 361-62, 41 S. Ct. 522, 65 L. Ed. 990 (1921); *In re Mann,* 907 F.2d 923, 926 (CA9 1990); *In re Combined Metals Reduction Co.,* 557 F.2d 179, 190-91 (CA9 1977).

vote for a hearing *en banc* (Appendix to Petitioner's Amended Petition, pp. 26-27).

SUMMARY OF ARGUMENT

The plain meaning of the statutory phrase, "reasonable equivalent value", should be applied. As Respondents paid such value, Petitioner's request herein must therefor be denied.

The intent of Congress to interpret the term "reasonable equivalent value" contrary to pre-Bankruptcy Code and state practice is not evident, explicit or clear. There is no reason why the laws of the states which do not directly conflict with 11 U.S.C. § 548(a)(2)(A) cannot remain valid and enforceable. Significantly, Congress has failed to amend 11 U.S.C. § 548(a)(2)(A), or the United States Bankruptcy Code, to prohibit courts from reaching the same conclusion as the Court of Appeals for the Ninth Circuit reached.

The Ninth Circuit's decision below is in conformity with Bankruptcy Code provisions, and Congress' intentions, as to secured debt.

It is indisputable that an interest in real property, or a deed of trust, or the mechanics of a foreclosure and foreclosure sale must all be determined, even in a bankruptcy context, according to the laws of the various states. It is proper for a federal bankruptcy statute to be interpreted and applied so as to achieve harmony with the laws of a particular state or states. Indeed, such harmonization is essential and required for the orderly administration of justice.

Contrary to Petitioner's argument, the foreclosure sale could not be set aside as to Respondents due to any defect in notice, because Respondents were only third-party innocent purchasers. Indeed, 11 U.S.C. § 548(c) precludes any set aside as to Respondents.

ARGUMENT

I.

THE PLAIN LANGUAGE OF 11 U.S.C. § 548(a)(2)(A) DEFEATS PETITIONER'S CLAIM.

The starting point in statutory interpretation is the language of the statute itself. *United States v. James*, 478 U.S. 597, 604, 106 S. Ct. 3116, 92 L. Ed. 2d 483 (1986).

The statutory provision asserted by Petitioner's complaint, and applied by the courts below, is 11 U.S.C. § 548(a)(2)(A). The pertinent provisions of that section of the Bankruptcy Code allow a voluntary or involuntary pre-bankruptcy transfer of the debtor's property to be avoided if the debtor "received less than a reasonably equivalent value in exchange for such transfer."

Petitioner contended in its complaint below against Respondents that it had received less than the reasonably equivalent value from the foreclosure sale of its property. In looking at the plain language of § 548(a)(2)(A), however, it is clear that the price paid by Respondents at the sale ($433,600 cash, *see* J.A. pp. 232-235) satisfied the value requirements.

The statutory words are easily defined.

"Reasonably", qualifying "equivalent" means "in a reasonable manner; in conformity to the dictates of reason". (Webster's Dictionary, 2d ed. 1979).

"Equivalent" means that the consideration paid must be equal to the property transferred or the debt involved. *Kass v. Doyle*, 275 F.2d 258, 260 (CA2 1960); *In re Venie*, 80 F.S. 250, 256 (W.D. Mo. 1948); 4 Moore & King, *Collier On Bankruptcy* (15th ed. 1992)

¶ 548-09, p. 548-108.1; *see also, Central Nat. Bank v. Bell*, 5 Cal. 2d 324, 328 (1936) — according to California law the price paid at a foreclosure sale is deemed equivalent to the value of the property sold. "Reasonably equivalent" therefor requires an equivalent value which is reasonable under the circumstances. *Mellon Bank N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (CA3 1991); *In re Minnesota Utility Contracting, Inc.*, 110 B.R. 414, 420 (D. Minn. 1990) — reasonable equivalent value requires that the debtor receive a concrete benefit, like the discharge of a debt.

Herein, the purchase price paid by Respondents was in excess of Petitioner's debt to Imperial (J.A. p. 232; Petitioner's Brief, p. 10) and, under the circumstances of the foreclosure sale, was reasonable and equivalent.

"Value" means property or satisfaction of an antecedent debt. 11 U.S.C. § 548(d)(2)(A). "Value" also includes the payment of cash or other consideration. *Mayors v. Comm'r of IRS*, 785 F.2d 757, 761 (CA9 1986); *Kass v. Doyle, supra*, 275 F.2d at 260; *In re Venie, supra*, 80 F.S. at 256; *see* Calif. Civil Code § 1605. Herein, Respondents paid $433,600 in cash.

Respondents paid "value" for the property and, under the circumstances at the time of the sale and because their payment fully paid off the antecedent debt Petitioner owed to Imperial, that value was "reasonably equivalent" as required.

It is well-settled that there is a "strong presumption" that Congress' intent is fully expressed by the plain language in a statute. Herein, Petitioner has failed to demonstrate that Congress intended to go beyond the plain language in § 548(a)(2)(A). As this Court noted in *Ardestani v. I.N.S.*, __ U.S. __, 112 S. Ct. 515, 520, __ L. Ed. 2d __ (1992):

> The "strong presumption" that the plain

> language of the statute expresses Congressional intent is rebutted only in "rare and exceptional circumstances", *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 701, 66 L. Ed. 2d 633 (1981), when a contrary legislative intent is clearly expressed. (Citations omitted.) In this case, legislative history cannot overcome the strong presumption "that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 1537, 71 L. Ed. 2d 748 (1982).

See also, United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026, 1031, __ L. Ed. 2d __ (1989).

This Court should apply the plain language of § 548(a)(2)(A) to the facts below and deny Petitioner's request herein. Petitioner has failed to present any legislative history showing Congress' contrary intent. Respondents clearly paid "reasonably equivalent value".

II.

THE PLAIN LANGUAGE OF 11 U.S.C. § 548(a)(2)(A), AND CONGRESSIONAL INTENT, DO NOT REQUIRE PETITIONER TO RECEIVE "MARKET VALUE".

Petitioner's position herein and below was that the purchase price paid by Respondent was less than the fair market value or "worth" of the property (Petitioner's Brief, pp. 10-11, 21; J.A. pp. 59-60; *see* Respondents' Court of Appeal Opening Brief, pp. 8-9).

Section 548(a)(2)(A) does not, however, refer at all to market value or worth. Section 548(d)(2)(A)'s definition of "value", applicable to § 548(a)(2)(A), does not refer to market value or worth.

Indeed, there is very little legislative history, and less Congressional guidance, as to the phrase "reasonable equivalent value" contained in 11 U.S.C. § 548(a)(2)(A). *Madrid v. Lawyers Title Insurance Corp. (In Re Madrid)* 725 F.2d 1197, 1199-1200 (9th Cir. 1984) ("*Madrid* (9th Cir.)").

The Historical and Revision Notes to § 548, "Notes of Committee on the Judiciary, Senate Report No. 95-989", pertinently state merely that

> Transfers made for less than a reasonable equivalent consideration are also vulnerable. . . .

The Court of Appeals pointed out in *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (CA4 1990), citing other cases, that the term "reasonable equivalent value" does not mean "market value". (*See* 4 Moore & King, *Collier On Bankruptcy* (15th ed. 1992) ¶ 548.09, pp. 548-104 to 548-112).

Absent an express requirement or direction by Congress, the Bankruptcy Courts and District Courts have the duty to determine "reasonable equivalent value" based on the facts presented to them.[3]

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3. In interpreting § 548(a)(2)(A) as it applies to noncollusive purblic foreclosure sales conducted pursuant to state laws, three general lines of approach have evolved among the Court of Appeals (*See* Amicus Brief of Federal Home Loan Mortgage Corporation, p. 5, fn. 2). The *Durrett* rule, based on dicta, allows a sale to be avoided if the price paid is less than 70% of its market value. *Durrett v. Washington National Insurance Co. (In re Durrett)*, 621

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Congress did not expressly restrict or prohibit those courts, in making such a determination, from applying, or harmonizing with, the foreclosure and real property laws of the States, nor did it pre-empt any relevant state laws. *California Federal Sav. & Loan Ass'n. v. Guerra,* 479 U.S. 272, 280-281, 292, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987).

Congress also did not expressly prohibit those courts, in making such a determination, from concluding, after an examination of certain factors, that an irrebuttable presumption as to value may arise.

Petitioner has failed to present any authorities or legislative history to demonstrate that Congress intended the term "reasonably equivalent value" to mean market value. As such, Petitioner's claim must be denied. *Ardestani v. I.N.S., supra; Connecticut Nat. Bank v. Germain,* __ U.S. __, 112 S. Ct. 1146, 1149-50, 117 L. Ed. 2d 391 (1992); *American Hospital Ass'n v. NLRB,* 499 U.S. __, 111 S. Ct. 1539, 1544, 1545-46, 113 L. Ed. 2d 675 (1991) — legislative history which is not directly linked to the statute under review is meaningless.

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F.2d 201 (CA5 1980); *contra, Federal Deposit Insurance Corp. v. Blanton,* 918 F.2d 524, 531 fn. 7 (CA5 1990). The *Madrid* rule, followed by the Ninth Circuit below and the Sixth Circuit, creates, *after* certain facts are established, an irrebuttable presumption in favor of non-collusive, statutorily proper sales. *Lawyers Title Insurance Corp. v. Madrid* (*In re Madrid*), 21 B.R. 424 (9th Cir. BAP 1982), *aff'd on other grounds,* 725 F.2d 1197 (CA9 1984). The *Bundles* rule, asserted by Petitioner, calls for an involved case-by-case analysis after a presumption in favor of the price paid, but results in the imposition of conduct and notice beyond state statutory requirements. *Bundles v. Baker* (*In re Bundles*), 856 F.2d 815 (CA7 1988). Respondents contend that the courts hereinbelow conducted the factual investigation required by *Bundles* and other Courts of Appeals (*See* Respondent's Brief in Opposition to Amended Petition for Writ of Certiorari, pp. 8-15).

III.

CONGRESS DID NOT INTEND 11 U.S.C. § 548(a)(2) TO CHANGE PRE-CODE PRACTICE, STATE LAWS OR THE MADRID RULE.

It is well-settled that Congress does not write laws on a completely clean slate.

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 266-267, 99 S. Ct. 2753, 2759-60, 61 L. Ed. 2d 521 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

Midlantic Nat. v. New Jersey Dept., 474 U.S. 494, 106 S. Ct. 755, 759, 88 L. Ed. 2d 859 (1986); *see also, United States v. Ron Pair Enterprises, Inc., supra,* 109 S. Ct. at 1032.

> Furthermore, this Court has been reluctant to accept arguments that would interpret the [Bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. (Citations omitted).

Dewnsup v. Timm, __ U.S. __, 112 S. Ct. 773, 779, __ L. Ed. 2d __ (1992).

Petitioner's proposed interpretation of § 548(a)(2)(A), which would allow a statutorily valid pre-bankruptcy foreclosure to be set aside as to innocent third-party purchasers (Respondents), is contrary to pre-Code practice, and Petitioner has totally failed to demonstrate a strong Congressional intent to deviate from that practice. *Contra, see* 11 U.S.C. § 548(c) — good faith transferees will retain the interest they acquired.

Respected commentators and authorities have noted that the historical and philosophical predecessor to 11 U.S.C. § 548 was Section 67d of the Bankruptcy Act of 1898. *Madrid v. Lawyers Title Insurance Corp.* (*In re Madrid*), *supra*, 725 F.2d at 1199-1200 (CA9 1984); *In re Littleton*, 888 F.2d 90, 92 fn. 5 (CA11 1989); 4 Moore & King, *Collier On Bankruptcy* (15th ed. 1992) ¶ 548.03, p. 548-50; 4 Moore & King, *Collier On Bankruptcy* (14th ed. 1978) ¶ 67.01, pp. 15-19 — historical antecedents.

Section 67d of the Act finally used the terms "present fair equivalent value" (not "reasonably"), which had the identical meaning as the "present value" requirement of Section 70d of the Act (the predecessor to 11 U.S.C. § 549).[4] 4B Moore & King, *Collier on Bankruptcy* (14th ed. 1978) ¶ 70.68, p. 750 — Sections 67d and 70d are "parallel" statutes; *see also*, Bankruptcy Act of 1841, § 2; The English Bankruptcy Act of 1914, § 45(g) — transfers for "present fair equivalent value" were protected; *In re Chase & Sanborn Corp.*, 904 F.2d 588, 593 fn. 11 — prior Act case law is applicable to the Code.

As explained by Professor James McLaughlin at the time the Act was amended, the terms "fair equivalent value" were used instead of the word "consideration", so that technical associations with the word "consideration" would be avoided (McLaughlin, *Amendment Of The Bankruptcy Act* (1926) 40 Harv. L. Rev. 583,

4. 11 U.S.C. § 548, dealing with pre-bankruptcy transfers, is the flip side of 11 U.S.C. § 549, which deals with post-bankruptcy transfers.

614-616). In fact, the language of the Uniform Fraudulent Conveyence Act of 1919 then in existence defined "fair consideration" as a "fair equivalent". Hence, § 548's language was drafted so as to be broader than the term "consideration". (*Id.*).

Under § 67d of the Act, proper sales would not be set aside on the basis of the value of the property sold. *Security Mortgage v. Powers*, 278 U.S. 149, 156, 49 S. Ct. 84, 73 L. Ed. 236 (1928); *In re Soudan Mfg. Co.*, 113 F. 804, 808-809 (CA 7 1902) — good faith is the test; 4 Moore & King, *Collier On Bankruptcy* (14th ed. 1978) ¶ 67.17, pp. 187-188, 190-190.1, ¶ 67.02, p. 18.

Similarly, under § 10 of theBankruptcy Act of 1800 the pre-bankruptcy sale of property to bona-fide purchasers who paid "a valuable consideration" would not be invalidated or set aside.

Pre-Code practice was to not allow the set aside of validly conducted foreclosure sales if "valuable consideration" was paid by innocent purchasers. Petitioner has presented *no* evidence of Congressional intent to change this established Pre-Code practice. *In re Reinholdt*, __ F.2d __, 10 C.B.C. 1226 (D. Minn. 1984) — no such intent exists. Indeed, the lack of available legislative history leads to the conclusion that Congress never intended such a change. *Midlantic Nat. v. New Jersey Dept., supra*; *Connecticut Nat. Bank v. Germain*, *supra*, 112 S. Ct. at 1150 (concurring opinion).

In addition to a clear Pre-Code practice, the laws and decisions of the various states (at the time the Code was enacted) also precluded the setting aside of a foreclosure sale based solely on value. *Kennedy v. Dunn*, 58 Cal. 339, 340 (1881); *Johnson v. Grant*, 87 Cal. App. 402, 405 (1927); *Central Nat. Bank v. Bell*, 5 Cal. 2d 324, 328 (1936); *Stafford v. Russell*, 117 Cal. App. 2d 326, 333 (1953); *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963); *Matter of Winshaw Settlor's Trust*, 758 F.2d 1136, 1139 (CA6

1985) — such laws and authorities are the "well-nigh universal rule"; R. Powell, *The Law of Real Property* (1993 ed.) § 468[6], p. 37-332-333.

Petitioner has presented no evidence of Congressional intent to change this established Pre-Code state practice and no evidence of Congressional intent to become involved in such state regulated area. As such, state laws and authorities must be allowed to stand unimpeded by the Code. *Nobelman v. American Sav. Bank*, __U.S.__, 113 S. Ct. 2106, 2110-2111, __L. Ed. 2d __ (1993).

Indeed, it is indisputable that Congress has regularly and knowingly not (in almost 15 years) taken a position, nor defined any guidelines, in view of the assorted decisions regarding "reasonable equivalent value". *In Re Ehring*, 91 B.R. 897, 901 (9th Cir. BAP 1988), *aff'd*, 900 F.2d 184, 189 (1990); *In Re Verna*, 58 B.R. 246, 250, 251 (Bk. C.D. Cal. 1986); *In Re Kachanizadeh*. 108 B.R. 734, 736 (Bk. C.D. Cal. 1989).

In addition, despite obviously being aware of it, Congress has never drafted legislation nor created any other prohibition or proclamation to overrule, negate, restrict or weaken the authority and reasoning of the 1982 decision in *Madrid* (9th Cir. BAP). (*Id.*) Yet, since that decision in 1982 (over 11 years ago), Congress has amended the Bankruptcy Code five times (in 1984, 1986, 1988, 1990 and 1992). By failing to make revisions in the Bankruptcy Code to overrule *Madrid* (9th Cir. BAP), Congress has tacitly approved that decision.[5] *Lorillard v. Pons*, 434 U.S. 575, 580, 90 S.

5. Congress' seeming partial nolens volens overruling of *Madrid* (9th Cir.) through the 1984 Amendments, relating to 11 U.S.C. § 101, did not affect *Madrid* (BAP) as it was based on different reasoning than *Madrid* (9th). (*Dewsnup v. Timm*, __U.S.__, 1125 S. Ct. 773, 779, __L. Ed. 2d__ (1992); *Muniz v. Hoffman*, 422 U.S. 454, 472, 95 S. Ct. 2178, 45 L. Ed. 2d 319 (1975); W. Conant, *Beyond Madrid: Resolving The Conflict Within The Ninth Circuit* *(Cont'd)*

Ct. 866, 55 L. Ed. 2d 40 (1978); *In Re Execuair Corp.*, 125 B.R. 600, 602-03, 604 (Bk. C.D. Cal. 1991); *see also Dewsnup v. Timm*, *supra*.

If any Congressional intent exists with respect to determining "reasonable equivalent value" under 11 U.S.C. § 548(a)(2)(A) it is that Congress has not intended to overrule *Madrid* (9th BAP) or any other decision. In effect, Congress' intent is obviously to leave such determinations to the various Courts of Appeal, which should apply state foreclosure laws, at least in part. It should also be clear that Congress has not prohibited consideration of, nor pre-empted, the laws of the states as to foreclosure or real property in any determination as to "reasonable equivalent value".

This Supreme Court should not substitute or impose any other intent as to the making of such determinations. Petitioner's claim must be denied.

IV.

THE NINTH CIRCUIT'S DECISION BELOW IS NOT CONTRARY TO THE INTENT OR PURPOSES OF THE BANKRUPTCY CODE.

Petitioner and amici supporting it contend that the Ninth Circuit's decision below is contrary to the purposes of the Bankruptcy Code. Nothing could be further from the truth.

At a minimum, the Ninth Circuit reached a decision which promoted harmony with state laws and authorities, and which allowed state laws and authorities to remain valid. Such a result is

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Regarding § 548(a)(2)(A) *And Nonjudicial Foreclosure Sales*, 18 Cal. Bankr. J. 221, 240, 241 (1990).)

always preferred. *Cf. Rake v. Wade*, ___U.S.___, 113 S. Ct. 2187, 2192, ___L. Ed. 2d___ (1993); *see* Point IV, *infra*.

Allowing state foreclosure and property laws to apply[6], or presumptions to be reached by courts as to "value", does not interfere with the overall purposes of the Bankruptcy Code and Congress.

The Bankruptcy Code indisputably provides that a creditor's right to foreclosure is not threatened or terminated by a bankruptcy case, and is unaffected by a discharge (*Johnson v. Home State Bank*, ___U.S.___, 11 S. Ct. 2150, 2153-54 (1991)). In particular, the avoidance powers set forth in the Bankruptcy Code are intended to assure an equitable distribution among unsecured creditors, which surely does not mean Congress intended to let the interests of unsecured creditors to override the rights of trust deed holders or good faith purchasers. *Matter of Winshaw Settlor's Trust, supra*, 758 F.2d at 1139 fn. 4.

This Court has specifically recognized that the justifications for application of state laws in bankruptcy cases include the protection of secured interests and mortgagees because the rights

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6. Generally, congress has not attempted, within the Bankruptcy Code, to enact, or pre-empt the states' laws regarding foreclosure, mortgages or real property (*Barnhill v. Johnson, supra*, 112 S. Ct. at 1389; *Dewsnup v. Timm, supra*, 112 S. Ct. at 778-779; *Johnson v. Home State Bank, supra*, 111 S. Ct. at 2153; *Farrey v. Sanderfoot*, 500 U.S. ___, 111 S. Ct. 1825, 1829, ___ L. Ed. 2d ___ (1991); *Grogan v. Garner*, 498 U.S. 279, 657, 111 S. Ct. 654, 657, 112 L. Ed. 2d 755 (1991); *Butner v. United States*, 440 U.S. 48, 54-56, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1978) — unless some federal interest requires a different result, state property law should be applied in bankruptcy; *In Re Rigden*, 795 F.2d 727, 736 fn. 1 (9th Cir. 1986) — state laws determine many rights in bankruptcy cases.) Pertinent to Respondents herein and in accord with a majority of state foreclosure laws, the bankruptcy laws have always been intended to protect bona fide purchasers. *See* Point III, *supra*.

of secured creditors were "bargained for" by the debtor and are protected by the Code. *Nobleman v. American Sav. Bank, supra*, 113 S. Ct. at 2110-2111; *Rake v. Wade, supra*; *see also*, 11 U.S.C. §§ 361, 362(d), 363(b)(1), 506, 545(2), 546(b), 549(c), 552(b), 724(b)(1), 725, 1102(a)(2), 1110(a), 1111(b)(1), 1123, 1129(b)(2)(A), 1322(b)(2), and 1325(a)(5).

The only potential asset lost at a foreclosure sale is the equity, if any, in the property sold. Such equity, however, accrues to the benefit of secured creditors, not debtors or unsecured creditors. *Dewsnup v. Timm, supra*, 112 S. Ct. at 778.

Herein, there was no lost equity. The property was encumbered by a senior trust deed of $421,815.72 and a junior trust deed of at least $200,000, totalling $621,815.72. Respondents purchased the property for $433,000, demonstrating a negative equity of [$-188,815.72]. Indeed, as the junior trust deed was extinguished by the foreclosure sale, Petitioner received a significant benefit. *In Re Littleton, supra*, 888 F.2d at 90, 93-94 (CA11 1989).

State foreclosure laws, which do not allow foreclosure sales to be set aside solely on the basis of an inadequate price (*see* Point III, *supra*), do not interfere or conflict with Congress' intent or the goals for bankruptcy cases. Such laws require determinations that: the foreclosure sale was conducted pursuant to statutory procedures; full noticing and competitive bidding occurred; the debt owed on the trust deed was paid; no fraud or collusion was present; no extraordinary circumstances existed; among other things. *Central Nat. Bank v. Bell, supra*, 5 Cal. 2d at 328.

Such determinations are implicit in 11 U.S.C. § 548(a)(2)(A), and are recommended by the *Bundles* approach. As noted in Respondent's Brief in Opposition, pp. 8-15, such determinations were made by the Bankruptcy Court below, based on a multitude of documents and evidence presented to it.

Hereinbelow, the Bankruptcy Court, in matters concerning Petitioner's complaint and the foreclosure sale, held evidentiary hearings on Respondents' Motion to Dismiss, Respondents' Motion For Relief From Automatic Stay and on Imperial's Motions For Summary Judgment, in addition to numerous adversary and case hearings (J.A. pp. 63-236; 298-299; 300-315; 1-5; 23-25; 26-32) The determination by the Bankruptcy Court below considered all the pertinent factors which § 548 requires, and *Bundles* said, should be examined.

The single most important non-price factor as stated by *Bundles* was compliance with state foreclosure sale requirements. (856 F.2d at 825) Hereinbelow, the Bankruptcy Court was apprised by Petitioner that it could not demonstrate that any California requirements were not fully complied with. Upon receiving competent evidence, the Bankruptcy Court also reached a specific judgment that the foreclosure sale was regularly and properly conducted. *See Madrid,* 21 B.R. at 426-427 (9th Cir. BAP) — compliance with state laws is, in accord with bankruptcy purposes, "a safeguard against the evils of private transfers to relatives or favorites."

As to the determination of a fair appraisal (856 F.2d at 824), California foreclosure statutes do not contain a requirement for such a document. *See* Calif. Civil Code § 2824 *et seq.* ("the California foreclosure statutes"); §§ 2924f, 2924g, 2924h — no appraisal is required for a foreclosure (trustee's) sales)). California nonjudicial foreclosure sales are sales which are governed by the highest price received at a public sale. *See* Calif. Civil Codes §§ 2924h (c) — property is sold based on "the last and highest bid". As such, the appraisal factor is of no consequence.

In any event, the Bankruptcy Court herein was presented with Petitioner's bankruptcy Schedules, adversary pleadings and self-serving declarations as to the property's alleged value (J.A., pp.

38-40; 59-60;2). Apparently Petitioner submitted no appraisals.

As to determining advertising for the sale (856 F.2d at 824)[7], California foreclosure statutes contain strict comprehensive requirements for noticing, posting and advertising. *See* Calif. Civil Code §§ 2924, 2924b, 2924c, 2924f — publication in a "newspaper of general circulation" once a week for 20 days; *see also,* R. Powell, *The Law of Real Property* (1993 ed.), § 466, p. 37-316 — all such prerequisites for sale are established by local law. As such, the only noticing and advertising required is that contained in the foreclosure statutes. *U.S. Cold Storage v. Great Western Sav. & Loan Ass'n,* 165 Cal. App. 3d 1214, 1229-30 (1985); *Strutt v. Ontario Sav. & Loan,* 28 Cal. App. 3d 866, 877 (1972). The Bankruptcy Court was presented with evidence of compliance with the California foreclosure statutes, which Petitioner could not refute.

As to determining whether competitive bidding was encouraged (856 F.2d at 824), the Bankruptcy Court was presented with evidence of obvious overbidding. Respondents' highest bid price was over $11,780 higher than the amount actually due on Imperial's foreclosed-upon deed of trust. That $11,780 surplus was made available to the holders of a $200,000 deed of trust in a junior position to Imperial's deed of trust. *See In re Littleton, supra,* 888 F.2d at 93-94 — reasonable equivalent value has clearly been paid when junior liens are also extinguished by the foreclosure sale.

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7. It is with this factor in particular, but also possibly others (*e.g.*, appraisal requirement), where other courts have interpreted *Bundles* (and particularly its use of the word "widely", 856 F.2d at 824) to require foreclosure sale actions and conduct to *exceed* the precise mandates under the comprehensive foreclosure laws of the states (*See In Re Lindsay* 95 B.R. 983, 991 (Bk. S. D. Cal. 1989); *see also In Re Kachanizadeh,* 108 B. R. 734, 738 — *Lindsay* violated *stare decisis* and was an improper decision). Imposing additional sale requirements will thus create a conflict, and result in tension, with the specific state laws of foreclosure.

In addition, the California foreclosure statutes require and encourage competitive bidding. Calif. Civil Code § 2924h; *see* § 2924h(g) — the fixing or restraining of bidding can result in fines and imprisonment; *Lupertino v. Carbajal*, 35 Cal. App. 3d 742, 746-47 (1973); R. Powell, *The Law of Real Property* (1993 ed.), § 439, p.137-14.

Thus, at several stages and evidentiary hearings, the Bankruptcy Court below was presented with ample evidence as to all the § 548 and *Bundles'* factors, which sufficiently demonstrated that a reasonably equivalent value had been paid by Respondents at the foreclosure sale. The examination of all relevant circumstances was made by the Bankruptcy Court herein. Therefore, as stated by *Bundles*, "we must accord [the Bankruptcy Court's determination] great deference." (856 F.2d at 825).

While the Seventh Circuit might disagree with the wording of the Ninth Circuit's opinion below, it could not disagree with the result herein. That result, of upholding the foreclosure sale, was derived herein from the same type of examination and analysis called for in *Bundles*.

Indeed, the Ninth Circuit's decision below, and the creation of any presumption, expressly requires findings as to: the lack of collusion or fraud; the propriety of conduct at the sale; compliance with State foreclosure requirements (which include noticing and bidding); and the price paid. These findings will, in addition, necessarily be made in light of: the debtor's bankruptcy pleadings (setting forth, *inter alia*, assets, debts and asserted property values); the debtor's alleged damages or loss of equity (as required by Rule 7009, Federal Rules of Bankruptcy Procedure and Rule 9 (g), F.R.C.P. — claims for damages must be specifically stated); and any other evidence submitted by the parties. Only *after* making a determination that the required elements do exist can a court conclude, according to the Ninth Circuit, that there is a presumption in favor of the price paid at the foreclosure sale.

Inasmuch as the determinations required by state foreclosure laws, and the determinations required by the Ninth Circuit's decision below, involve various factors which are implicitly to be determined pursuant to 11 U.S.C. § 548(a)(2)(A), and do not interfere or directly conflict with the Bankruptcy Code, they are permissible and not pre-empted.

V.

THE BANKRUPTCY COURT DID NOT ERR IN DISMISSING PETITIONER'S COMPLAINT.

Petitioner contends that its complaint should not have been dismissed on the basis that it failed to state a claim for relief.

The *Conley* case cited by Petitioner (Petitioner's Brief, p. 25) is not applicable. It involved a motion for judgment on the pleadings; herein, Respondents filed a motion to dismiss.

Petitioner's citation to *Kelson v. Springfield*, 767 F.2d 651 (CA9 1988) is correct but that decision is contrary to Petitioner's position. As pointed out in *Kelson*, the issue on a motion to dismiss is one of law — assuming the alleged facts are true is there a legal basis for the stated claim?

Hereinbelow, there clearly was no such legal basis for Petitioner's complaint. As noted by the Bankruptcy Court, *Madrid* (BAP) was still the law in the Ninth Circuit. *See* Appendix to Petitioner's Amended Petition, pp. 28-32; *see also In re BFP*, 974 F.2d 1144, 1148 (CA9 1992). The Bankruptcy Court was bound to follow the *Madrid* (BAP) decision. *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 471-472 (CA9 1990); *In re Kachanizadeh, supra*, 108 B.R. at 738 (Bk. C.D. Cal. 1989). Any contrary ruling would have violated the doctrine of *stare decisis*.

Based on the facts as admitted by Petitioner to the Bankruptcy

Court, there was no legal basis upon which Petitioner could proceed. Petitioner had informed the court that it could not contest compliance with state laws or show collusion or fraud.

The Bankruptcy Court applied the proper standard of review and did not err in dismissing Petitioner's complaint as to Respondents. Indeed, a contrary decision would have violated established principles and authorities, and would have been in error.

VI.

THE NINTH CIRCUIT'S DECISION CREATED HARMONY BETWEEN EXISTING STATE SUBSTANTIVE LAWS AND FEDERAL BANKRUPTCY LAW, AND WAS CORRECT.

As noted herein above (Point IV, *supra*), the Bankruptcy Court made the proper evidentiary determinations implicitly required by the Bankruptcy Code. With the correct result at hand, the Ninth Circuit attempted in its decision below to avoid conflicts with State law.[8][9] It concluded that:

8. Herein, it is well-settled under the laws of California, and other states, that a foreclosure sale may not be set aside based solely on the inadequacy of price absent the showing of some other irregularity. *See* Point III, *supra*. In addition, and particularly pertinent as to Respondents, California foreclosure statutes expressly create a "conclusive presumption" in favor of bona fide purchasers at foreclosure sales. Calif. Civil Code § 2924; *Wolf v. Lipsy*, 163 Cal. App. 3d 633, 639 (1985) — this conclusive presumption is irrebuttable; *Napue v. Gor-Mey West, Inc.*, 175 Cal. App. 3d 608, 613 (1985); *Karrell v. First Thrift of Los Angeles*, 104 Cal. App. 2d 536, 539 (1951). Significantly, California law provides that if a sale is set aside, the foreclosing beneficiary/trustee is liable to repay the price paid plus interest. *Little v. CFS Service Corp.*, 188 Cal. App. 3d 1354 (1987).

9. The Ninth Circuit's decision below was also in harmony with other (Cont'd)

> [B]y following the Madrid formulation we are able to give a reasonable meaning to § 548 without unduly upsetting local real estate markets or state law. Unlike the *Bundles* court, we see the issue as *both* one of statutory interpretation *and* the growing tension between preemption and the requirements of a vigorous federal system . . . Thus, by interpreting § 548 in accordance with the Madrid formulation, we are able to balance bankruptcy policy and comity concerns.[6]"

(974 F.2d at 1149)

Other Courts of Appeal have agreed:

> . . . The better view is that reasonable equivalence for the purposes of a foreclosure sale under § 548(a)(2)(A) should be consonant with the state law of fraudulent conveyances . . . No support for this drastic upset of state law and procedures is found in the Bankruptcy Code.

Matter of Winshaw Settlor's Trust, supra, 758 F.2d at 1139-40; *see also Gottlieb v. McArdle*, 580 F. Supp. 1523, 1525 — under federal law, a foreclosure sale should be set aside only if the price paid shocks our conscience).

(Cont'd)
decisions regarding applying state law, and decisions interpreting different avoidance sections of the Bankruptcy Code, which decisions also authorized regularly conducted foreclosure sales to stand (*See In Re Ehring* 91 B.R. 897, 900 (9th Cir. BAP), *aff'd*, 900 F.2d 184 (1990) —11 U.S.C. § 547; *In Re Walker*, 861 F.2d 597 (9th Cir. 1988) — 11 U.S.C. § 549(c), if the purchasers record first).

> [I]t is important to interpret the two [bankruptcy law and state law] statutes in a way that minimizes such conflicts and harmonizes the policies that underlie them.

Kapela v. Newman, 649 F.2d 887, 890-91 (CA1 1981); *see also County of Yakima v. Yakima Indian Nation*, ___U.S.___, 112 S. Ct. 683, 692, 116 L. Ed. 2d 687 — courts must harmonize statutes on the same topic so that each is left effective; *Fed'l Trade Comm. v. Bunte Bros. Inc.*, 312 U.S. 349, 61 S. Ct. 580, 582, 85 L. Ed. 881 (1941); *Chicago & N.W.R. Co. v. Lindell*, 231 U.S. 14, 18, 50 S. Ct. 200, 201, 74 L. Ed. 670 (1930) — due regard must be given for a proper adjustment of local and national interests and laws.

The Ninth Circuit's decision below does just that, and in a way which does not interfere or conflict with Bankruptcy Code purposes or Congressional intent. The Court of Appeals was faced with reconciling a simple bankruptcy statute with a comprehensive system of state foreclosure laws.[10]

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10. The Ninth Circuit also understood that a restrictive interpretation could result in undesirable consequences both on a bankruptcy and state level. Indeed, these consequences would be contrary to any price-maximizing objective of the Bankruptcy Code. "It makes little sense to interpret § 548(a)(2)(A) in a way that will likely discourage healthy foreclosure bidding." (974 F.2d at 1148-1149) The chilling effect which could result from a pre-emptive interpretation of 11 U.S.C. 548(a)(2)(A) is obvious and has been widely discussed. *Matter of Grissom*, 955 F.2d 1440, 1446; *Matter of Winshaw Settlor's Trust, supra*, 758 F.2d at 1139; *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547, 550 (dissent); *In Re Verna, supra*, 58 B.R. at 252 — a rule of certainty is necessary to encourage bidders, maximize amounts paid and create a market for sales; S. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objections*, 71 Va. L. Re. 933, 963-64, 980 (1985). Indeed, this Court should interpret federal bankruptcy laws so as to encourage the flow of capital and lending. *Nobelman v. American Sav. Bank, supra*, 113 S. Ct. at 2112 (concurring opinion).

As the California Supreme Court explained in *I.E. Associates v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 288:

> There are, moreover, persuasive policy reasons which militate against a judicial expansion of those [State statutory] duties. The nonjudicial foreclosure statutes — an alternative to judicial foreclosure — reflect a careful crafted balance of the interests of the beneficiary, trustors and trustees . . . In taking all these concerns into account, the statutes strike an overall balance favoring the protection of trustors (Citations omitted.).

See also, Garfinkle v. Superior Court, 21 Cal. 3d 268, 278 (1978); *Smith v. Allen*, 68 Cal. 2d 93, 96 (1968); *Pacific Scene, Inc. v. Penasquitos, Inc.*, 46 Cal. 3d 407, 411 (1988) — such comprehensive legislation indicates a clear legislative intent that the statutory system shall be totally controlling in the area legislated.

As this Supreme Court has made clear

> Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of that happenstance of bankruptcy." *Lewis v. Manufacturers National Bank*, 364 U.S. 603, 609. The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee . . .

Butner v. United States, 440 U.S. at 55.

VII.

PETITIONER INCORRECTLY ASSERTS THAT NOTICE DEFECTS WOULD JUSTIFY SETTING ASIDE THE FORECLOSURE SALE.

Petitioner asserts, incorrectly, that the foreclosure sale can be set aside because of the alleged defects in giving notice of the sale (Petitioner's Brief, p. 47).

Petitioner misstates the law.

The only notice required is that called for in California's foreclosure statutes. *U.S. Cold Storage, supra,* 165 Cal. App. 3d at 1229-30. Indeed, Petitioner admitted to the Bankruptcy Court that all California statutory requirements had been complied with *(See* Appendix to Petitioner's Amended Petition, pp. 28-32).

More importantly, California law specifically provides that third party bona fide purchasers obtain a conclusive presumption that all noticing and other statutory requirements have been complied with. Calif. Civil Code § 2924; *Wolf v. Lipsy, supra,* 163 Cal. App. 3d at 639. Accordingly, it is well-settled that a foreclosure sale may not be set aside, as to third-party bona fide purchasers like Respondents, due to any defect in notice. *Napue v. Gor-Mey West, Inc., supra,* 175 Cal. App. 3d at 613. *See* 11 U.S.C. § 548(c).

Petitioner's assertion to the contrary is false.

CONCLUSION

The Bankruptcy Court below made the determinations, and reviewed all relevant factors, as required by § 548 and most Courts of Appeals.

The application of state foreclosure law, or the reaching of an irrebuttable presumption after an evidentiary determination, are not prohibited by, or in conflict with, Bankruptcy Code purposes or Congressional intent.

Congress has never expressed any intent that § 548 was to change pre-Code practice or existing state laws, which allowed properly conducted foreclosure sales for value to remain valid. Without a clear expression of such an intention, this Court should not deviate from those practices or laws.

Congress has tacitly approved of, and has never overruled or disapproved of, the opinion in *Madrid* (9th Cir. BAP), which was a basis for the Ninth Circuit's decision below. Indeed, Congress' intent in light of almost 15 years of decisions, is to leave a determination under 11 U.S.C. § 548(a)(2)(A) to the various Courts of Appeals, subject to state foreclosure laws.

The Ninth Circuit's decision promoted harmony with complex state laws, encouraged bidding at sales, created stability and finality, enhanced potential recoveries by debtors and creditors, and promoted an active market place for real property which is essential to the well-being of this country.

If this Court were to take the position asserted by Petitioner it would force tens of thousands of lenders, investors, or foreclosure trustees to set up reserves for repayment to successful third-party purchasers in order to deal with potential sale set-asides which might occur years in the future. Such a result would be expensive,

cumbersome and disastrous to the real estate, foreclosure and lending industries.

The Ninth Circuit's decision was not erroneous and must be permitted to stand.

For these reasons, and other reasons as may be apparent herein, this Supreme Court should deny Petitioner's requests.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 92-1370

In the Supreme Court of the United States

OCTOBER TERM, 1993

BFP, PETITIONER

v.

RESOLUTION TRUST CORPORATION AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the consideration received from a noncollusive foreclosure sale that is conducted before the commencement of a bankruptcy case and in conformance with applicable state law constitutes "reasonably equivalent value" under 11 U.S.C. 548(a)(2)(A).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1370

BFP, PETITIONER

v.

RESOLUTION TRUST CORPORATION AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 974 F.2d 1144. The opinion of the bankruptcy

[1] As we explained in footnote 2 of our brief in response to the petition for a writ of certiorari, petitioner incorrectly describes the status of the Resolution Trust Corporation (RTC). The RTC is acting in this case as receiver of Imperial Federal Savings Association (Imperial Federal), and not as receiver of Imperial Savings Association (Imperial). The Director of the Office of Thrift Supervision (OTS) appointed the RTC receiver of Imperial on June 22, 1990. OTS Order No. 90-1193. On that same day, the Director of OTS authorized the organization of Imperial Federal, and the RTC transferred certain assets and liabilities of Imperial to Imperial Federal. OTS Order Nos. 90-1194, 90-1195. On April 19, 1991, the Director of OTS appointed the RTC receiver of Imperial Federal. OTS Order No. 91-214. We have lodged with the Clerk of the Court, and provided to counsel for the parties, copies of the orders cited in this footnote. Throughout this brief, we refer for convenience to the respondents other than the RTC as the private respondents.

appellate panel in the Imperial matter (Pet. App. 49-68) is reported at 132 B.R. 748. The opinions of the district court in the matter involving the private respondents (Pet. App. 41-43, 44-48), and the opinions of the bankruptcy court in both matters (Pet. App. 28-32, 33-40) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24-25) was entered on September 8, 1992. A petition for rehearing was denied on November 17, 1992. Pet. App. 26-27. The petition for a writ of certiorari was filed on February 16, 1993 (a Tuesday following a Monday holiday), and granted on May 24, 1993, J.A. 356. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The text of 11 U.S.C. 548(a)(2) is set forth in the appendix to this brief. App., *infra*, 1a.

STATEMENT

1. On August 27, 1987, Sheldon and Ann Foreman conveyed the real property at issue in this case to Wayne and Marlene Pedersen. On the same day, a deed was executed conveying the property from the Pedersens to petitioner (a partnership in which the partners were the Pedersens and Russell Barton).[2] Petitioner received title

[2] It has been determined in related state-court proceedings that Marlene Pedersen did not in fact execute the deed to petitioner; apparently Wayne Pedersen signed her name to that instrument without her permission, or caused a third party to do so. J.A. 253-254, 266. As discussed below, the court of appeals concluded (Pet. App. 14-17) that petitioner nevertheless received valid title to the property in question, and the validity of the conveyance to petitioner is not at issue in this Court. See Pet. Br. 49.

subject to a first lien in favor of Imperial Savings Association (Imperial), to secure payment of a loan of $356,250 made to the Pedersens to enable them to purchase the property. Petitioner granted a second lien to the Foremans, securing payment of an additional $200,000. When petitioner failed to make timely payments on the Imperial loan, Imperial commenced foreclosure proceedings under state law. The foreclosure proceedings were delayed by an involuntary bankruptcy proceeding filed against petitioner by Off Road Vehicles—Recreation and Family Campground, Inc. (ORV), which claimed title to the property in question based on a deed from the Pedersens.[3] After that bankruptcy proceeding was dismissed in June of 1989, the foreclosure proceedings were completed at a foreclosure sale on July 12, 1989. At that sale, respondent Paul Osborne purchased the property for $433,600,[4] acting on behalf of the private respondents. After the sale, a

[3] In September of 1987, the Pedersens executed an instrument purporting to convey the property in question to ORV, notwithstanding the prior deed from the Pedersens to petitioner, and apparently without the consent of their partner Mr. Barton. Petitioner and the Foremans (who, as noted above, held a second lien on the property) filed suit in state court against ORV seeking to quiet title to the property. See Pet. App. 6, 51-52; J.A. 51-52. The state court eventually ruled that the deed to ORV was invalid and quieted title against ORV. J.A. 316-320.

[4] The opinions of the court of appeals (Pet. App. 7), the bankruptcy appellate panel (Pet. App. 54), and the bankruptcy court (Pet. App. 38) recite that the price was $433,000. Although the parties occasionally have used that figure in their briefs (see Pet. 6, J.A. 60, 132, 158, 206, 292), they also frequently have stated that the price was $433,600 (see J.A. 38, 68, 92, 195, Br. in Opp. 3), and the underlying record suggests that the $433,600 figure is correct. See J.A. 235 (recital of consideration in trustee's deed), 306 (declaration regarding sale); see also Pet. Br. 10 (noting the inconsistency and suggesting that the $433,600 figure is correct).

trustee's deed was recorded evidencing the conveyance of the property from petitioner to the private respondents. See Pet. App. 3-7, 50-52; J.A. 170-174 (notice of trustee's sale), 232-236 (trustee's deed), 306-307 (declaration describing sale).[5]

2. Several months later, in October 1989, petitioner filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174. In the bankruptcy case, petitioner instituted an adversary proceeding seeking to set aside the conveyance of the property to the private respondents at the foreclosure sale. Petitioner argued that the sale was a fraudulent conveyance that the bankruptcy court was empowered to avoid under 11 U.S.C. 548(a)(2), which permits a bankruptcy trustee to avoid certain transfers of property of the debtor if the debtor "received less than a reasonably equivalent value in exchange for such transfer." See Pet. App. 8-9; J.A. 41-62 (text of complaint). The private respondents and Imperial filed separate motions in response to the complaint. Because the bankruptcy court disposed of the motions separately, and because they were appealed separately, we discuss the two sets of responses in turn.

a. On January 2, 1990, the private respondents filed a motion to dismiss the complaint for failure to state a claim. J.A. 63-281 (text of motion with exhibits). In a March 6, 1990, order, the bankruptcy court granted that motion. Pet. App. 28-32. The court explained that petitioner had "failed to make any allegations that the involved trustee's sale was not in compliance with California state law, nor [*sic*] any allegations that said trustee's sale was conducted collusively or fraudulently." *Id.* at 30-31. Petitioner appealed, but the district court affirmed. *Id.* at 41-43.[6] The court issued a short order stating that "the court below has ascertained and applied the existing law of this Circuit correctly in reaching its legal conclusions and its decision." *Id.* at 42.[7]

b. In April 1990, Imperial also filed a motion for judgment on the pleadings and a motion for summary judgment. J.A. 298-299, 300-302. In July 1990, the bankruptcy court granted summary judgment in favor of Imperial. Pet. App. 33-40. The court explained that the sale could not be avoided for two reasons. First, it stated that "there was no transfer of an interest of property of the Debtor when the property was sold at the sale." *Id.* at 38-39. The court explained that "the Pedersons [*sic*] did not have an interest in the property when they purported to transfer the title to the property to [petitioner]. Therefore, [petitioner] never received good title." *Id.* at 39.[8] Alternatively,

[5] Petitioner and related parties filed two separate actions in the California state courts challenging the validity of the foreclosure sale. Petitioner and the other plaintiffs voluntarily dismissed the first action shortly after it was filed, but soon filed a second action. The second action was voluntarily dismissed as to the private respondents when they filed a motion to dismiss in October 1989. See Pet. App. 8; J.A. 68-73. The RTC has advised us that the second action remains pending against it.

[6] Under 28 U.S.C. 158(b), the judicial council of a court of appeals may establish a bankruptcy appellate panel to hear appeals from decisions of bankruptcy courts under 28 U.S.C. 158(a). Those panels, however, can hear cases only "upon the consent of all the parties." 28 U.S.C. 158(b). The appeal discussed in the text initially was assigned to a bankruptcy appellate panel, but the case was transferred to the district court after petitioner objected to the panel's hearing the appeal. J.A. 6, 342-343.

[7] The district court also issued a brief opinion denying a motion for rehearing, in which petitioner asked the district court to hold the case in abeyance pending resolution of the reasonably-equivalent-value question by the Ninth Circuit bankruptcy appellate panel in another case. Pet. App. 44-48.

[8] The state trial court previously had stated in its Announcement of Tentative Decision (J.A. 252-258) that there "was a failure of con-

the court reasoned that the sale could not be invalidated even if a transfer of property of the debtor had occurred at the sale. The court stated that "a reasonably equivalent value was received in exchange for the transfer, because the nonjudicial foreclosure sale was non-collusive and regularly conducted." *Ibid.*

The bankruptcy appellate panel affirmed. Pet. App. 49-68. Applying the analysis of its decision in *In re Madrid,* 21 B.R. 424 (1982), aff'd, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S. 833 (1984), the panel stated that

> [a] non-collusive and regularly conducted nonjudicial foreclosure sale prior to the filing of a bankruptcy case cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes "reasonably equivalent value" as a matter of law.

Pet. App. 54-55. The panel then rejected petitioner's claims that the sale in this case was not regularly conducted. *Id.* at 56-59.[9]

3. Petitioner appealed from both decisions. Before the court of appeals resolved the appeals, the RTC was appointed receiver of Imperial Federal Savings Association, the successor in interest to Imperial Savings Association.

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sideration for the conveyance of the property [from the Foremans] to * * * Wayne and Marlene Pedersen." *Id.* at 255. The court concluded that the failure of consideration "justifies and requires the rescission of the Foreman's [*sic*] deed [to the Pedersens]." *Ibid.*

[9] Bankruptcy Judge Volinn dissented. Pet. App. 60-68. He argued that the panel should adopt the reasoning articulated by the Seventh Circuit in *Bundles* v. *Baker* (*In re Bundles*), 856 F.2d 815, 820, 824 (1988), under which there is a rebuttable presumption that the price obtained at a noncollusive foreclosure sale constitutes reasonably equivalent value.

See Pet. App. 5 n.1; note 1, *supra.* The court of appeals consolidated petitioner's appeals from the two decisions and affirmed. Pet. App. 1-23. The court first considered whether petitioner had a property interest at the time of the foreclosure sale. *Id.* at 14-17. Relying on the terms of the judgment of the state court, the court rejected the bankruptcy court's conclusion that petitioner never received title to the property. *Id.* at 15.[10]

On the "reasonably equivalent value" question, the court adopted the view of the Sixth Circuit that the consideration received at a noncollusive, regularly conducted foreclosure sale constitutes a reasonably equivalent value under Section 548(a)(2)(A). Pet. App. 17-18 (citing *In re Winshall Settlor's Trust,* 758 F.2d 1136, 1139 (6th Cir. 1985)). The court explained that it "necessarily part[ed] from the positions taken by the Fifth Circuit in *Durrett* [v. *Washington National Insurance Co.,* 621 F.2d 201 (1980),] and the Seventh Circuit in *Bundles* [v. *Baker* (*In re Bundles*), 856 F.2d 815, 820 (1988)]." Pet. App. 18-19 (footnote omitted).[11] In the court's view, "allowing a bankruptcy court to undo a foreclosure sale carries with it the strong potential to destabilize state mortgage transactions." *Id.* at 20. The court found that result

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[10] Although the state court previously had reached a different conclusion, see note 8, *supra,* its formal judgment filed on October 12, 1989, stated without explanation that petitioner had an interest in the property. J.A. 319 ("It is further ordered, adjudged and decreed that [petitioner], Sheldon L. Foreman and Ann Fant Foreman are the sole owners of said real property in fee simple.").

[11] As mentioned in note 9, *supra, Bundles* adopted a rebuttable presumption that the price obtained at a noncollusive foreclosure sale constitutes reasonably equivalent value. 856 F.2d at 820, 824. Interpreting a provision of the old Bankruptcy Act analogous to Section 548(a)(2), *Durrett* suggested that any foreclosure sale producing less than 70% of fair market value should be invalidated. 621 F.2d at 203-204.

> untenable from both federal and state perspectives. From a state viewpoint, an ad hoc approach produces intolerable uncertainty regarding the finality of any purchase at a foreclosure sale even if the price paid at the sale is close to, but not equal to, the retail market value. From a federal perspective, this uncertainty undermines the price-maximizing objectives of section 548(a)(2) because potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty.

Id. at 20-21 (internal quotation marks omitted). Noting this Court's admonition that "interpretation of federal statutes should be tempered with due regard for traditional state areas of regulation," *id.* at 22 (citing *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-2618 (1992)), the court held that the price received at a noncollusive, regularly conducted foreclosure sale establishes reasonably equivalent value for purposes of Section 548(a)(2)(A).

SUMMARY OF ARGUMENT

The Bankruptcy Code authorizes the avoidance of certain transfers made by a debtor up to one year before the debtor filed for bankruptcy if the debtor did not receive "reasonably equivalent value" for the property it transferred. Section 548(a)(2).[12] Petitioner contends that the statutory language authorizes bankruptcy courts to second-guess the bidding that took place at a regularly conducted and noncollusive foreclosure sale, overturn the sale, and reclaim the property from the purchaser at the foreclosure sale. We disagree with that contention for three reasons.

[12] For ease of reference, this brief refers to provisions of the 1988 version of Title 11 by Section number only.

First, petitioner's argument rests on the assumption that Section 548(a)(2) allows invalidation of all transfers for which the debtor did not receive the price that conventional marketing of the property might bring. Section 548(a)(2) does not require, however, that the debtor receive that measure of value—commonly denominated "fair market value"—in exchange for the property, but only "reasonably equivalent value." To be sure, the sale price in a foreclosure proceeding may be less than the price that professional real estate brokers promoting the property in the conventional market might obtain. But that difference is to be expected, because the foreclosure process—by definition—must dispose of property with dispatch, and thus must value the property and transfer title without the expenditure of funds or the passage of time that would occur in the ordinary course of a sale by conventional means. A properly conducted foreclosure sale provides an acceptable measure of "reasonably equivalent value" for that property under the circumstances, if it brings together persons interested in purchasing such property and allows them to bid fairly on its purchase.

Second, petitioner's interpretation would undermine the States' traditional role in our federal system as the authorities that promulgate and enforce rules for the creation and transfer of interests in real property, including rules for transfers by foreclosure. The States have established rules governing foreclosure sales that reflect the weighing of the relative rights and obligations of the affected parties. Under petitioner's interpretation, a federal bankruptcy court could override the State's judgment in this core area and repudiate a properly conducted foreclosure sale. Indeed, if petitioner were correct, no purchaser at a foreclosure sale could be sure it had clear title until the end of the lengthy period during which the sale could be challenged in a bankruptcy proceeding. There is

no persuasive reason to believe that Congress intended that destabilizing result, which would directly impede the transfer and development of real property.

Finally, the procedures that the States employ in foreclosure sales provide an adequate basis for determining value in the context of a forced liquidation. In California, a foreclosing lender must give more than three months' notice of the sale to the borrower and other parties who have requested notice and publish notice in a newspaper of general circulation in the area. The sale must be by open auction and must take place during regular business hours. Although those procedures may not produce the precise equivalent of fair market value, they are sufficient to protect against the possibility that property will be sold for substantially less than fair market value. Accordingly, they are adequate to determine "reasonably equivalent value" for purposes of Section 548(a)(2)(A). Hence, the court of appeals correctly declined to second-guess the price received at the foreclosure sale in this case.

ARGUMENT

THE PRICE RECEIVED AT A PUBLIC, NONCOLLUSIVE FORECLOSURE SALE CONDUCTED IN ACCORDANCE WITH STATE LAW IS "REASONABLY EQUIVALENT VALUE" FOR PURPOSES OF SECTION 548(a)(2)(A)

Section 548(a)(2)(A) of the Bankruptcy Code grants trustees in bankruptcy the power to avoid certain transfers made "within one year before the date of the filing of the petition," if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation."[13] Petitioner contends (Pet. Br. 27-40) that a trustee

[13] In this case, petitioner (the debtor) makes the claim directly, rather than through a trustee. That is appropriate under Section 1107(a), which provides that in Chapter 11 cases where a trustee has not been appointed, "a debtor in possession shall have all the rights [with exceptions not relevant here] and powers * * * of a trustee serving in a case under this chapter."

is entitled under that provision to reclaim property sold before the bankruptcy filing at a public foreclosure sale that conformed in every way to the requirements for such a sale under applicable state law, on the theory that the price the debtor received at the public auction was not necessarily "reasonably equivalent" to the value of the property at that time. We disagree, for three reasons: because petitioner's reading fails to accord significance to the language chosen by Congress, because it results in an unwarranted intrusion of federal bankruptcy law into areas customarily governed by state law, and because the applicable state rules in this case adequately protect the debtor's interest in the property conveyed at foreclosure.

A. The Concept Of "Reasonably Equivalent Value" In Section 548(a)(2)(A) Is Distinct From The Concept Of "Fair Market Value" And Does Not Require Judicial Second-Guessing Of The Results Of A Properly Conducted Foreclosure Sale

The first difficulty with petitioner's reading is that it accords no significance to the language of the statute. Section 548(a)(2)(A) does not use the unadorned term "value," as many other provisions of the Code do,[14] or even the similar phrase "fair market value," which is used occasionally in other provisions of the Code, see Sections

[14] See, *e.g.*, Sections 361(1), (2) (adequate protection), 363(f)(3) (sale of property of estate), 506(a) (determination of secured status), 1129(a)(7) (confirmation of Chapter 11 plan), 1325(a) (confirmation of Chapter 13 plan). It is especially noteworthy that the Code uses the simple term "value" more than once in provisions closely related to Section 548(a)(2)(A). See Sections 548(c) (purchaser protected who takes for "value"), 550(a) (liability of transferee of avoided purchase extends to "value" of property).

346(j)(7)(B), 522(a)(2). Instead, Congress used the phrase "reasonably equivalent value," which appears in the Code only in this provision.[15] Congress's choice of the qualified formulation affects the meaning of the statute in two ways. First, it necessarily lowers the threshold of acceptable compensation: the statute does not require an "equivalent" value, but only a "reasonably equivalent" value. Second, by directing courts to consider whether the compensation a debtor received upon conveyance of property was "reasonably equivalent," Congress authorized courts to consider factors that would not have been relevant in determining "fair market value."

That point weighs heavily in this case. Petitioner could make a strong argument that the consideration received at a foreclosure sale is not "equivalent" to the value the property would bring if professional real estate brokers, working for a substantial fee, promoted the property in the conventional market. But that does not mean that the consideration falls short of "reasonably equivalent value" in exchange for the property. In determining "reasonably equivalent value," a court must take into account the fact that the debtor's failure to satisfy its financial obligations has made it necessary for the creditor to liquidate the collateral in accordance with the terms of the agreement of the parties. If those circumstances result in a transfer at a price that is not precisely equivalent to some abstract valuation of the property, the price nevertheless should be considered reasonably equivalent value under the circumstances.

Moreover, petitioner's view of the statute fails to acknowledge the implications of the term "value." In our economy, the "value" of an item generally is the amount

[15] Congress also used the related term "fair equivalent value" in Section 549(c) to describe the standard for avoiding rescission of a post-bankruptcy transfer made to a transferee without knowledge of the case.

of money that a person would be willing to pay for the item, an amount that each person determines based on his evaluation of the potential risks and benefits of owning the property. The best evidence of value, then, is the amount of money the item actually brought upon sale in an open market. In many cases, of course, courts must fix a price as a substitute for a market transaction that has not taken place. See, *e.g.*, Sections 506(a) (determination of value of property of estate for purposes of determining secured status), 1129(a)(7) (determination of value for purposes of confirming plan of reorganization). In those situations, courts of necessity must rely on expert testimony and other secondary evidence to form the best estimate possible.[16] But in cases in which property actually has been sold in an open market, a court attempting to ascertain the "true" value of the property should be quite reluctant to second-guess the market by crediting evidence introduced to support a finding that the property had a value at the time of the sale higher than the value it brought at the sale. Whether the evidence rests on expert testimony as to amounts that nonexistent, hypothetical purchasers supposedly would have paid for the property, or evidence regarding the amount that actual purchasers paid for other pieces of property thought to be similar, such evidence is inherently suspect whenever it is used to support a finding of a "value" for property that is contradicted by the results of an actual market transaction that occurred at the relevant time. In sum, so long as the sale conforms with applicable state law and results in an open sale under conditions reasonably designed to offer an op-

[16] Congress was well aware of the difficulties courts would face in determining accurate values even in the circumstances where judicial valuation was required. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 222 (1977) (characterizing valuation of business for purposes of confirming a plan of reorganization as "a guess compounded by an estimate") (quoting Peter Coogan).

portunity for any interested parties to bid on the property, the court should accept the price the property brings at the sale as reasonably equivalent value.[14]

B. Invalidation Of A Properly Conducted Foreclosure Sale Would Intrude Improperly On The States' Core Power To Promulgate Rules For Creating And Transferring Interests In Real Property

The Bankruptcy Code displays respect for state rules of property law, which Congress generally has allowed to remain in force except where "some federal interest requires a different result." *Butner* v. *United States,* 440 U.S. 48, 55 (1979). See *ibid.* (courts should avoid granting "a windfall merely by reason of the happenstance of bankruptcy") (internal quotation marks omitted). As the Court has explained, "[w]e do not read these statutory words with the ease of a computer," but must allow notions of "our federalism * * * [to] influence our interpretation of the Bankruptcy Code." *Kelly* v. *Robinson,* 479 U.S. 36, 49 (1986) (internal quotation marks omitted). A rule allowing federal courts to overturn foreclosure sales that are con-

[17] Petitioner's amicus suggests (Allen *et al.* Amicus Br. 11-13) that provisions in the Bankruptcy Code defining "transfer" to include a foreclosure, 11 U.S.C. 101(54) (Supp. IV 1992), and extending the Section 548 avoidance power to involuntary transfers demonstrate that all foreclosure sales are subject to avoidance under Section 548. That suggestion is incorrect. Those provisions simply establish that foreclosure sales fall within the general definition of "transfer" that is subject to avoidance under Section 548(a)(2); they do not address the question of what type of proof is necessary to establish that any particular foreclosure sale may be avoided under Section 548(a)(2). As the text suggests, we believe it would be appropriate to invalidate foreclosure sales that are collusive or otherwise fail to comply with state law. Absent the provisions on which petitioner's amicus relies, it would be open to question whether the trustee would have the power to avoid such a sale.

ducted in accordance with state law does not afford sufficient weight to the States' legitimate interest in promulgating reliable and stable norms for the creation and transfer of interests in real property.

A variety of factors combine to aggravate the destabilizing effect petitioner's reading would have on the systems the States have developed for allowing creditors to take title to collateral upon a default by their debtors. At the threshold is the circumstance that the avoiding power under Section 548(a) reaches outside the bankruptcy proceeding to invalidate a transaction that took place before a bankruptcy petition was filed. Absent some substantial federal interest, the parties to such a transaction are entitled to rely on the procedures for transferring property permitted by state law and agreed upon in their contract.

There are, of course, certain circumstances in which important federal policies justify the invalidation of pre-bankruptcy transactions. Section 547 allows the invalidation of preferences—transactions that in Congress's view tend to allow one creditor to receive an unduly large share of the debtor's assets. Similarly, Section 548 allows the trustee to invalidate fraudulent conveyances—transactions by which the debtor dissipates the estate before the bankruptcy petition is filed. That Section allows the trustee to avoid not only transactions in which the debtor actually intended to defraud creditors, Section 548(a)(1), but also transactions that are only constructively fraudulent, where fraud may be presumed from the inadequacy of the consideration, Section 548(a)(2). See Thomas H. Jackson, *Avoiding Powers in Bankruptcy,* 36 Stan. L. Rev. 725, 778 (1984) ("Since here, as elsewhere, proving intent is difficult, * * * [certain] [a]ctions * * * are presumed to be fraudulently motivated.").[18]

[18] See generally John C. McCoid II, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration,* 62 Texas L.

But when the transfer occurs pursuant to a noncollusive foreclosure sale, there is no basis for supposing that the debtor or any other party has engaged in conduct designed to dissipate the estate. The debtor had no choice in the matter, and the creditor who foreclosed on the property was simply enforcing a prearranged procedure for establishing the value of the collateral in the event of a default by the debtor. Accordingly, the policies on which Section 548(a)(2) rests do not support stretching the language of the statute to allow invalidation of such transactions.

The most serious consequences of invalidating pre-bankruptcy foreclosure sales stem from the problem that under such a rule no purchaser at a foreclosure sale could be sure that it had received clear title to the property, no matter what it paid. For example, if the purchaser's estimates of the likely profits from a particular asset and of an appropriate interest rate would justify a particular price, and if it succeeded in purchasing the property at the foreclosure sale for a price quite close to that upper limit,

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Rev. 639, 643-644 (1983) (explaining distinction between actual and constructive fraud in the Uniform Fraudulent Conveyance Act and Section 548(a)). The power to avoid transfers that were only constructively fraudulent apparently stems from Chancellor Kent's decision in *Boyd & Suydam* v. *Dunlap*, 1 Johns. Ch. 478 (N.Y. Ch. 1815). See McCoid, *supra*, 62 Texas L. Rev. at 649-652. That rule was codified in the Uniform Fraudulent Conveyance Act in 1918, on which Section 548 was modeled. See *id.* at 643. Since the Bankruptcy Code was enacted, the National Conference of Commissioners on Uniform State Laws has addressed the problem at issue in this case specifically, in the 1985 Uniform Fraudulent Transfer Act. That Act provides that a person "gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale." Uniform Fraudulent Transfer Act § 3(b), 7A U.L.A. 650 (1985). See Peter A. Alces & Luther M. Dorr, Jr., *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. Ill. L. Rev. 527, 540-541.

the purchaser nevertheless would be exposed to a risk of rescission, because the bankruptcy court might accept more optimistic assessments of the property offered by the debtor, and thus value the property at a higher figure. That problem is exacerbated by the timing of the inquiry: if the property has appreciated in value since the time of the foreclosure sale, a court deciding with the benefit of hindsight may be reluctant to attribute a value to the property as of the time of the transfer significantly lower than the value the property has at the time of the determination in the Section 548 proceeding.[19]

The Bankruptcy Code's remedial provisions also ensure that the possibility of rescission that would exist under petitioner's reading of the statute would undermine a purchaser's incentive to bid at a foreclosure sale. First, Section 550(a)(1) grants the bankruptcy trustee the power to recover the property purchased at the foreclosure sale. Although Section 550(d)(1) provides that the purchaser will retain a lien on the property to secure the cost of improvements made to the property after the purchase, Section 550(d)(1) does not provide a complete remedy to the purchaser for at least two reasons. First, it does not require repayment of the costs of improvements, but only grants a lien, so that any funds the purchaser has invested in the property will remain tied up in the property indefinitely. Second, the amount of the lien does not completely compensate the purchaser for its development of the property, because the lien is limited to the lesser of the

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[19] See Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 Cardozo L. Rev. 581, 596 (1987) ("The fact is that the mortgagee of commercial real estate has no way of knowing what a judge, using hindsight, and perhaps with a special agenda, will determine to be the value of the property.").

net investment in the property, Section 550(d)(1)(A), or the increase in value of the property after the transfer, Section 550(d)(1)(B). Thus, if the purchaser makes a fruitful investment in the property (which increases the value of the property by an amount greater than the amount of the investment), the trustee will reap the rewards of the investment, because the lien will be limited to the costs of the investment. If the investment is unsuccessful (that is, if it increases the value of the property by an amount lower than the amount of the investment), the purchaser will bear the loss, because the lien will be limited to the increase in value.

The combined effect of those provisions would deprive a purchaser of property at a foreclosure sale of a secure ability to profit from development of property purchased at a foreclosure sale until the lengthy and indefinite statute of limitations runs[20] on the debtor's ability to challenge the foreclosure under Section 548.[21] Indeed, if a trustee

[20] An action to recover property under Section 550 must be brought before the earlier of the conclusion of the case or one year after the transfer was avoided. Section 550(e). The trustee's avoiding power under Section 548(a), in turn, extends to any transfer made "within one year before the * * * filing of the petition." Finally, under Section 546(a)(1), an action under Section 548 may not be commenced more than two years after the appointment of a trustee. In cases like this one, where a trustee is not appointed, an action under Section 548 may be brought at any time before the case is closed or dismissed, Section 546(a)(2). In a successful case, that does not occur until the conclusion of payments under the plan. Section 1112(b).

[21] Nor can the purchaser protect itself by purchasing insurance. In the wake of the Fifth Circuit's decision in *Durrett* v. *Washington National Insurance Co., supra,* many States do not allow title insurance companies to issue insurance that would protect a purchaser at a foreclosure sale against the possibility that the sale will be invalidated in bankruptcy. See, *e.g.*, Texas Department of Insurance, Form T-1, Exclusions from Coverage 5, at 4 (Jan. 1, 1993) (exclusion from Owner

believed that it could establish that the foreclosure sale price was inadequate, it would be in a position to speculate on the value of the property and the success of any future development by delaying a Section 548(a)(2) complaint to observe changes in the value of the property. If the property decreased to a value lower than the consideration received at the foreclosure sale, the trustee could refrain from seeking to rescind the sale. If, on the other hand, the efforts of the purchaser resulted in a significant increase in value, the trustee could file a complaint and step in to retake control of the property.

Accordingly, a rule allowing federal courts to invalidate foreclosure sales that were conducted in accordance with state law and the agreement of the parties before filing of the bankruptcy petition would significantly limit the incentive of individuals considering a purchase at a foreclosure sale. Such a limitation could be expected to lead to lower revenues for debtors—and hence less funds with which to repay the debts owed other creditors—as well as to significant disincentives for development of properties that are purchased at foreclosure sales.[22]

Policy of Title Insurance for "[a]ny claim which arises out of the transaction vesting in the [insured] the estate or interest insured by this policy, by reason of the operation of federal bankruptcy * * * laws that is based on * * * the transaction creating the estate or interest Insured by this Policy being deemed a fraudulent conveyance"); see also Federal Home Loan Mortgage Corporation *et al.* Amicus Br. 13 & n.10 (discussing similar forms promulgated by American Land Title Association).

[22] Petitioner's amicus suggests that purchasers would respond to a rule permitting invalidation of sales for inadequate consideration by bidding more (in an attempt to limit the chance that a court subsequently would invalidate the purchase under Section 548(a)(2)). Allen *et al.* Amicus Br. 50-51. Because it assumes that a rule lessening the rights acquired upon purchase would result in an increased purchase price, that suggestion is quite counterintuitive. See Douglas G. Baird

In a tradition running at least back to the thirteenth century statutes of mortmain, lawmakers in the Anglo-American tradition have disfavored rules that "frustrated" "the general policy of the common law, which favored the free circulation of property," *Perin* v. *Carey*, 65 U.S. (24 How.) 465, 495 (1861) (emphasis omitted).[23] The rule

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& Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 Vand. L. Rev. 829, 846 (1985) (explaining why a rule permitting invalidation of foreclosure sales as fraudulent conveyances would lead to reduced prices at such sales); McCoid, *supra*, 62 Texas L. Rev. at 661 (same).

Petitioner's amicus also suggests that Professor Shuchman's empirical research has "demonstrate[d] that in the circuits employing *Durrett* and its progeny there have been no negative effects engendered at foreclosure sales." Allen *et al.* Amicus Br. 53-54 (citing Philip Shuchman, *Data on the* Durrett *Controversy*, 9 Cardozo L. Rev. 605, 616 (1987)). Professor Shuchman's claims, however, are considerably overstated. First, his study looked only to the rate of mortgage lending, the loan-to-value ratio, and the interest rate offered by the lenders. See *id.* at 629-636. Given the relatively small fraction of loans that become subject to foreclosure, only a dramatic effect on the anticipated result upon foreclosure could be expected to have a significant effect on the terms of the loan up front. See Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 Va. L. Rev. 489, 500-515 (1991) (empirical study concluding that laws protecting mortgagors do not have a significant impact on interest rates). Second, his evidence considers only residential mortgage lending, which, because it involves relatively small dollar values, is likely to be less sensitive to such effects. Finally, even within that limited area, his evidence in fact shows that the rate of mortgage lending in Texas – the principal state affected by the *Durrett* case – in fact grew at a rate considerably lower than the national average for the two years immediately following this Court's denial of a petition for a writ of certiorari raising the question. See Robert M. Zinman, Durrett *Data: Shucking the Husks from the Grain*, 9 Cardozo L. Rev. 1013 (1988) (identifying flaws in Professor Shuchman's empirical study).

[23] For a general discussion of early mortmain provisions, see 4A George W. Thompson, *Commentaries on the Modern Law of Real Property* § 2014, at 600-602 (1961).

sought by petitioner in this case would frustrate that policy. Of course, if Congress had enacted a statute that clearly stated the rule sought by petitioner, the decision in this case would be obvious and the foregoing presentation would be irrelevant. But the Bankruptcy Code does not by its terms authorize federal courts to invalidate transactions that bring less than a "fair market value," and does not even implicitly prescribe a method for federal courts to use in determining what is a "reasonably equivalent value." Hence, the Code does not require federal courts to overturn the mechanisms established under state law, and agreed to by the parties, for placing a value on collateral upon an entity's failure to repay a debt. In light of our country's long tradition of state-law preeminence in crafting rules for the creation and transfer of interests in real property, and the strong interest in those rules permitting parties to agree upon enforceable procedures for future transfers of property, only a clear statement should be sufficient to persuade courts that Congress intended to require federal bankruptcy courts to overturn properly conducted foreclosure sales. Because the Code lacks any such rule entirely, much less a clear statement of such a rule, the court of appeals correctly determined that reasonably equivalent value should be determined by reference to the price for which the property sold at a regularly conducted foreclosure sale.

C. California's Procedures For Conducting Foreclosure Sales Are Adequate To Produce Reasonably Equivalent Value

Because fair procedures for sale are necessary for a sale to be a reliable method of determining reasonably equivalent value, it is important to examine the procedures under which California permits foreclosures to occur. Although petitioner's amicus devotes a considerable portion of its

brief to a largely anecdotal criticism of the procedures the States have established for foreclosure sales, Allen *et al.* Amicus Br. 41-49, that discussion does not refer to any of the California procedures at issue in this case. Those procedures are fully adequate to justify a federal court in respecting the result of such a sale as reasonably equivalent value.

Under Cal. Civ. Code § 2924 (West 1993), a lender wishing to conduct a nonjudicial foreclosure sale must start by filing a notice of default with the county recorder, identifying the property and the nature of the default. Within ten days thereafter, the lender must send the notice not only to the defaulting borrower, but also to any party that has notified the county recorder that it wishes to receive notice of a default with respect to the land in question. *Id.* § 2924b(a), (b)(1). After a three-month waiting period, the lender must give notice of the sale. *Id.* § 2924. At least 20 days before the sale, the notice must be sent to the parties who have requested notice under Section 2924b(a) and also must be posted at the site of the sale and at the location of the delinquent property. *Id.* §§ 2924b(c)(3), 2924f(b)(1). The notice also must be published weekly in a local newspaper of general circulation. *Id.* § 2924f(b)(1). The debtor has the right to cure the default at any time up to five days before the sale. *Id.* § 2924c(e). Finally, the sale must take place in the county where the property is situated and must "be made at auction, to the highest bidder," between the hours of 9:00 a.m. and 5:00 p.m. on a business day. *Id.* § 2924g(a).

Courts interpreting those provisions have been vigilant in their efforts to ensure compliance with the statutory requirements. See, *e.g.*, *Whitman* v. *Transtate Title Company,* 165 Cal. App. 3d 312, 322, 211 Cal. Rptr. 582, 589 (1985) ("We further observe that the foreclosure procedure, being statutorily prescribed, must be strictly com-

plied with."); *Miller* v. *Cote,* 127 Cal. App. 3d 888, 894, 179 Cal. Rptr. 753, 756-757 (1982) ("The statutory requirements must be strictly complied with."); *System Investment Corporation* v. *Union Bank,* 21 Cal. App. 3d 137, 152-153, 98 Cal. Rptr. 735, 744-745 (1971) (procedures "must be strictly followed"). Similarly, as the California Court of Appeal has explained:

> The trustee at a foreclosure sale * * * has a duty to conduct the sale fairly and openly, and to secure the best price for the trustor's benefit. * * *
>
> * * * * *
>
> The courts scrutinize a sale held under power in a trust deed carefully, and will not sustain it unless it is conducted with fairness, openness, and scrupulous integrity, and the trustee exercises sound discretion to protect the rights of all interested parties and obtain the best possible price.

Bank of Seoul & Trust Co. v. *Marcione,* 198 Cal. App. 3d 113, 118-119, 244 Cal. Rptr. 1, 3 (1988).[24]

Hence, notwithstanding the anecdotal impressions offered by petitioner's amicus, the actual state of the law is that California statutes require ample notice of the sale to be sent to all interested parties, which gives the borrower a fair opportunity to identify a buyer willing to purchase the property for its actual value. Furthermore, California courts have shown that they stand ready to invalidate a foreclosure sale that does not fully comply with those procedures. In those circumstances, federal courts attempting to evaluate the transfer after the fact should limit their inquiry to determining whether the sale was conducted in

---

[24] We quote the version of this passage that appears in the California Appellate reporter; the version in the California Reporter publication contains what appears to be a typographical error.

accordance with the prescribed procedures.[25] If the sale was conducted in accordance with state law, the court should credit the price for which the property sold as reasonably equivalent value.[26]

---

[25] Petitioner briefly argues (Pet. Br. 47-48) that the sale was not conducted in accordance with applicable state law. That argument is not included within the questions presented in the petition, which presuppose "a non-collusive regularly conducted foreclosure sale" and "compliance with state laws on foreclosure." Pet. i. In any event, the bankruptcy court (Pet. App. 30-31), the bankruptcy appellate panel (Pet. App. 56-59), and the court of appeals (Pet. App. 23 n.7) each concluded that the sale was properly conducted. Petitioner offers no basis for questioning the correctness of those concurrent findings of the lower courts. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984) (Court is "reluctant to disturb findings of fact in which two courts below have concurred."); *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976) (questions of state law on which lower courts agreed do not warrant review by Supreme Court).

[26] Although the question of remedy is not before the Court, petitioner suggests (Pet. Br. 48-49) that some remedy other than invalidation of the sale and recovery of the property might be available. In light of that suggestion, a few brief comments on the issue are appropriate. Petitioner's complaint asked only that the court "declare the transfer of assets to [the private respondents] null and void, vacate and set aside the trustee's deed of trust [*sic*] given with respect thereto, and award [petitioner] costs of action and such other and further relief as the [c]ourt may deem just." J.A. 61-62. Because the property is not in the hands of the RTC, petitioner apparently would not seek that injunctive relief against the RTC. In any event, injunctive relief against the RTC as receiver would be barred by 12 U.S.C. 1821(j) (Supp. IV 1992) ("Except as provided in this section, no court may take any action * * * to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or receiver."); see 12 U.S.C. 1441a(b)(4)(A) (Supp. IV 1992) (RTC "shall have the same powers and rights to carry out its duties [where it was appointed receiver for a failed savings and loan institution between December 31, 1988, and October 1, 1993,] as the Federal Deposit Insurance Corporation has under sections 1821, 1822, and 1823 of this title."); see also *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, 112 S. Ct. 459, 463-466 (1991) (interpreting a similar provision in 12 U.S.C. 1818(i)(1) (Supp. I 1989)).

To the extent petitioner believes, as its brief suggests (Pet. Br. 48-49), that it is entitled to monetary damages from the RTC as receiver, neither the bankruptcy court nor the district court have jurisdiction over such a claim, because petitioner has not exhausted the administrative remedies available for such claims. See 12 U.S.C. 1821(d)(6) (Supp. IV 1992) (judicial review of claims against FDIC or RTC as receiver permitted after claimant seeks administrative review); 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992) ("Except as otherwise provided in this subsection, no court shall have jurisdiction over" claims against FDIC or RTC as receiver.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1993

APPENDIX

Section 548(a)(2) of the Bankruptcy Code, 11 U.S.C. 548(a)(2), provides:

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

* * * * *

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1993—342-479/86009

SUPREME COURT, U.S.
FILED
SEP 27 1993
OFFICE OF THE CLERK

NO. 92-1370

IN THE SUPREME COURT OF THE UNITED STATES
October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

RESOLUTION TRUST CORPORATION as Receiver of IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER BFP AND APPENDICES

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Petition for Certiorari filed February 16, 1993

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REPLY BRIEF OF PETITIONER BFP

Petitioner, BFP, replies to the briefs herein referred to as "Osborne"[1] "RTC"[2], "Am. Council"[3], "Council of States"[4], "Fed. Home"[5], "Cal. Trustees"[6],

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1. Respondents, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCZ

2. Respondent, RESOLUTION TRUST CORPORATION

3. Amici AMERICAN COUNCIL OF LIFE INSURANCE and AMERICAN COLLEGE OF REAL ESTATE LAWYERS

4. Amici COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U. S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION

5. Amici FEDERAL HOME LOAN MORTGAGE CORPORATION, MORTGAGE BANKERS' ASSOCIATION OF AMERICA, SAVINGS & COMMUNITY BANKERS OF AMERICA, and AMERICAN LAND TITLE ASSOCIATION

6. Amici CALIFORNIA TRUSTEE'S ASSOCIATION, CALIFORNIA LAND TITLE ASSOCIATION, CALIFORNIA BANKERS' ASSOCIATION, MORTGAGE INSTITUTE OF CALIFORNIA and CALIFORNIA INDEPENDENT MORTGAGE BROKERS' ASSOCIATION

and "Walter"[7] as follows:

BFP replies under titles substantially as used in BFP's Brief and new I-K. A Table of References to Briefs follows the Table of Authorities herein.

Because of the difficulty in replying to 185 printed pages in the allowed 20 printed pages (45 typed), BFP asks this Honorable Court to forgive BFP for giving multiple citations only in the Table of Authorities and not to assume that failure to reply to an argument is an admission.

STATEMENT OF THE CASE, B. FACTS

The excess of the bid over the amount due is said to have been "made available" to the junior trust deed holder (Osborne p. 3, 19) although not received (J.A. p. 324).

7.Amicus JIM WALTER HOMES, INC.

Osborne refers to BFP's "second" bankruptcy (Osborne pp. 2-3). The first was involuntary, by an assignee of a partner; the other partner objected successfully (paragraphs 17-24 and 28-31 of Complaint, J.A. pp. 53-61).

The required statutory notices were given (Osborne p. 3, f.n. 1), however, BFP's requested notice of continued sale dates was not given (F herein).

Osborne erroneously claims there was an evidenciary hearing (Osborne p. 20).

ARGUMENT

A. UNDER THE APPLICABLE STANDARD OF REVIEW, CONFLICTS IN EVIDENCE ARE RESOLVED AND INFERENCES MADE IN FAVOR OF THE PARTY RESISTING THE MOTIONS, PETITIONER BFP.

The principle of Conley v. Gibson, 355 U.S.41 (Osborne p. 21), although on a judgment on the pleadings, is applicable to dismissals.

B. THE PLAIN LANGUAGE OF 11 U.S.C. 548 (a)(2) IS THAT A FORECLOSURE

SALE DOES NOT ESTABLISH THE REASONABLY EQUIVALENT VALUE NOR AN IRREBUTTABLE PRESUMPTION THEREOF.

Whether a foreclosure sale is a transfer is considered in E herein.

1. UNAMBIGUOUS LANGUAGE OF A STATUTE GOVERNS ITS INTERPRETATION.

Respondents concede that the starting point in statutory interpretation is the language of the statute (Osborne, p. 6; Am. Council p. 7; Walter pp. 1-8). Osborne quotes Ardestani v. I. N. S., ___ U.S. ___, 116 L.Ed. 2d 496 (1991). Absent expressed contrary intent, the inquiry ends there. In United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) (Osborne p. 11, Walter p. 22) the court applied statutory language saying:

> "[2] The plain meaning of legislation should be conclusive, except in the 'rare' cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."

Debates, reports, reasons for a

bill, and purpose must give way to the language; MacKenzie v. Hare, 239 U.S. 299, 308 (1915).

The plain language of the statute governs. Connecticut National Bank v. Germain, 503 U.S. __, 117 L.Ed.2d 391, 397-398 (1992); United States v. Rutherford, 442 U.S. 544, 551-52 (1979); Malat v. Riddell, 383 U.S. 569 (1965) and Helvering v. Hammel 311 U.S. 504, 510, 511 (1941).

Respondents ignore the plain, clear language of 11 U.S.C. 548(a)(2) that the trustee may avoid (1) "any transfer," (2) of an interest of debtor in property, (3) within one year before the filing of a petition in bankruptcy (4) if debtor received less than reasonably equivalent value, and (5) debtor was or thereby became insolvent.

2. THE FEDERAL LAW, NOT THE STATE LAW, GOVERNS; 11 U.S.C. 548 SHOULD NOT BE HARMONIZED WITH STATE LAW.

RTC admits or contends that it would be appropriate to avoid sales that can be avoided under state law, Congress respects state law and avoidance of properly conducted sales would intrude on state powers (RTC f.n. 11, p. 14). Others boldly assert that Congress intended by 11 U.S.C. 548 only to apply state law of fraudulent conveyances and not to avoid regularly conducted foreclosures (Osborne pp. 12 and 14; Council of States pp. 8-19; Cal. Trustees p. 7; Walter pp. 1-3, 17-23). Respondents ignore the basics of bankruptcy. In chapter 7, debts may be discharged and in Chapter 11, they may be reduced by cram down contrary to state law. Respondents' argument defies the unambiguous language of 11 U.S.C. 548(a)(2) which creates a federal standard of reasonably equivalent value. Matter of Bundles, 856 F.2d 815, 822 (7th Cir. 1988).

Under 11 U.S.C. 542 the trustee has all of the powers of the debtor to avoid transfers; Camp v. St. Paul Fire and Marine Ins. Co., 989 F.2d 428, 429 (11 Cir. 1993); and under 11 U.S.C. 544(b) the rights of unsecured creditors; 11 U.S.C. 544(b); Lippi v. City Bank, 955 F.2d 599, 608 (9th Cir. 1992).

Rake v. Wade, __ U.S. __, 124 L.Ed.2d 424 (1993) is cited as harmonizing with state law (Osborne pp. 15, 16, 17). It did not apply state law and held that 11 U.S.C. 506(d) and 1322(b) require interest be paid.

Midlantic Nat. v. New Jersey Department, 474 U.S. 494, 505 (1986) (Osborne p. 11) is cited for the rule that Congress did not intend to change a "judicially-created concept" referring to a state environmental statute. The court said:

> "Title 28 U.S.C. Section 959(b) . . . commands the trustee to

> 'manage and operate the property in his possession . . . according to the requirements of the valid laws of the state.'. . . "

There, state law was expressly spared from preemption.

Section 548 provides for avoidance in bankruptcy of transfers for less than reasonably equivalent value, contrary to those state laws which hold that inadequacy of price alone is not a basis for setting aside foreclosures in an action by transferor (or by his creditors).

Dewsnup v. Timm, 116 L.Ed.2d 773 (1992) is said to voice concern for fundamental states' rights, show the Bankruptcy Code does not preempt state law and that no change was intended by Section 548 (Walter pp. 17, 20, 22; Fed. Home p. 22; Osborne p. 16 f.n. 6 and 17; Am. Council p. 15). Respondents' conclusion is incorrect. There, a Chapter 7 debtor sought to "strip down" a secured

creditor. This Court held that "allowed" in 11 U.S.C. 506(d) refers to the "allowed" in 11 U.S.C. 502, not 506(a) and the secured party keeps his security.

California Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81, 292 (1987) is cited to show that state law is not preempted (Osborne p. 10). BFP does not assert any preemption of state laws. State laws govern actions by a transferor or his creditors to avoid a conveyance. Once bankruptcy is filed, the trustee in bankruptcy has powers under 11 U.S.C. 548 to avoid certain foreclosures.

The case on review is said to be in the posture of U. S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) (Walter p. 22) which said that 11 U.S.C. 506(d) requires interest even if the agreement [under state law] does not. Section 548 gives power to avoid a transfer for less than reasonably equivalent value while

generally state laws do not.

In Security Mortgage v. Powers, 278 U.S. 149 (1926) (Osborne p. 13), this court said that the validity of a lien is determined by state law and enforcing it in bankrukptcy against proceeds of sale, of the secured property raises federal questions peculiar to bankruptcy law.

Congressional silence is said to accept Madrid (Osborne p.17). Dewsnup and cases cited in B.1 above show it does not where, as here, the statute is clear. Also, if any law were accepted by silence, Durrett was accepted; the 1984 amendment made the rule of Durrett more clearly applicable.

Butner v. United States, 440 U. S. 48, 54 (1979), (Osborne pp. 16, f.n. 1, p. 25; Walter pp. 18, 22, 23) held that state law determines whether the mortgagee had a right to rents collected during the mortgagor's bankruptcy saying:

> "The constitutional authority of Congress to establish uniform laws on the subject of bankruptcies throughout the United States would clearly encompass a federal statute defining a mortgagee's interest in rents and profits earned by property in a bankruptcy estate. . . . The Bankruptcy Act does include provisions invalidating certain security interests. . . "[8]

In said footnote 8, the Court said:

> "Sections 107(a) and (b) invalidating certain liens . . . and certain fraudulent transfers . . . "

Butner was cited in Barnhill v. Johnson, 503 U.S. ___, 118 L.Ed.2d 39, 46 (1992), where this court said that what is a transfer is a matter of federal law.

Definitions in dictionaries and court decisions may be considered as to meaning of words. Thus, in holding children as used in federal statute on succession to a copyright included illegitimate children, DeSylva v. Ballantine, 351 U.S. 570, 581 (1955) (Council of States pp. 4, 12) the court said:

> "That does not mean that a state would be entitled to use the word

> "children" in a way entirely strange to those families with its ordinary usage."

Surely, one could not look to the rule that "inadequacy of price alone" is not a ground for avoiding a sale, to interpret the rule that lack of "reasonably equivalent value" is a ground for avoidance.

In Nobleman v. American Savings Bank, 508 U.S. ___, 124 L.Ed.2d 228 (1993) (Walter, pp. 17-18; Fed. Home p. 22; see also Osborne, p. 14), this Court pointed out that Bankruptcy Code's automatic stay and debtor's right to cure prepetition defaults affect mortgagee's rights. Here, controlling federal law defines transfers and provides that certain transfers for less than reasonably equivalent value are avoidable; admittedly bankruptcy law may alter state law (Walter p. 25, 26, 27).

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 120 L.Ed.2d 407 (1992) (RTC

p. 8; Council of States pp. 3-8; Walter p. 28) this court said that Congress' express preemption indicates an intent not to preempt other matters and there is a presumption against preemption of state police power. That case does not help Respondents because the court looked to the statutory language first (clear in the matter on review) and, unlike police powers, the Constitution gives Congress power to establish bankruptcy laws (U. S. Constitution, Section 8, clauses 1-4).

Kelly v. Robinson, 479 U.S. 36, (1986) (Council of States p. 21 and passim) held that under 11 U.S.C. 523(a)(7) nondischargeability was subject to interpretation. Here the amount to be reasonably equivalent is subject to interpretation but the type of transaction is not; foreclosures are included.

Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603, 609 (1961)

referred to avoiding powers under 67d of the Bankruptcy Act as a power given trustees which creditors do not have.

Kupetz v. Wolf, 845 F.2d 842, 845 (9th Cir. 1988) (Cal.Trustees pp. 6, 7, 16, 18) (authored by the Judge who authored the opinion being reviewed) is cited for the statement that the purpose of 11 U.S.C. 548 and state law are the same (Cal. Trustees pp. 6, 7, 15, 16). The only case cited for that rule was Coder v. Arts, 213 U.S. 223, 241, (1909), decided before the avoidance powers under Bankruptcy Act applied to involuntary transfers. In Kupetz, a voluntary transfer was reviewed. An issue was the meaning of "fair consideration" in former Cal. Civil Code Sec. 3439.04 (Appendix D). "Reasonably equivalent value" seems more concerned with a comparison of values and less with circumstances of the transaction than "fair consideration".

Respondents cite no cases prior to the Uniform Fraudulent Transfer Act (of 1984), "UFTA" herein (App. E hereto), holding that the bid establishes "fair consideration", "reasonably equivalent value" or a presumption of such. The Uniform Fraudulent Conveyance Act, "UFCA" herein, Section 4 (App. C hereto) (and Cal. Civil Code Section 3439.04 from 1-1-40 to 1987) (App. D hereto) refers to "conveyance made". One might expect "conveyance made" to mean a voluntary transfer and not expect to find cases discussing the consideration or value received on foreclosure. The cases on foreclosure arising under the UFCA (App. C. hereto) BFP finds (with one exception) had aspects or badges of actual fraud; none of them discussed fair consideration. The exception is In re Christian, 48 B.R. 833, 835, headnote 6,

(D.C. Colo. 1985)[8] avoiding a foreclosure under 11 U.S.C. 548 but saying that a transfer had occurred under Colorado law.

Under the Bankruptcy Code, involuntary transfers are expressly subject to Section 548 avoidance powers.

If state law were held to govern, would the California version (effective 1-1-87) of the 1984 UFTA, apply in cases arising in California? California and all of the thirty states which adopted the UFTA by the end of 1992 adopted Section 1 providing that it applies to involuntary transfers; 3 states except foreclosures. Section 3(b) of the UFTA was not adopted in California (See Section 3439.04, App. F hereto), Arkansas

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8. 7a Uniform Laws Annotated shows Colorado as having adopted the UFTA in 1991 and does not show Colorado as having adopted the UFCA. Colorado could have adopted the UFCA after the book went to press and before Colorado adopted the UFTA.

and Montana (7a Uniform Laws Annotated 175). Said section 3(b) expressly provides that a noncollusive foreclosure establishes reasonably equivalent value.

Even under state law, emphasis on intent has changed to objectivity (see excerpts from Frank Kennedy, Appendix H hereto).

Recognition that 11 U.S.C. 548 creates a federal standard is in keeping with the constitutional authority to establish uniform laws on bankruptcies (Bankruptcy Act 1, Section 5, clauses 1 and 4). This court referred to the Bankruptcy Act as intended to have a uniform application McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945) (and said that bankruptcy law determines what is a transfer).

3. PRIOR LAW DOES NOT MAKE FORECLOSURES IMMUNE FROM AVOIDANCE UNDER SECTION 548.

It is argued that Congress intended

no change in prior law by Section 548 (Osborne, p. 11, 13). See Midlantic v. New Jersey, (Osborne p. 11) and Dewsnup v. Timm, both discussed in B.1 and B.2 hereinabove. As said in Dewsnup (see B.2 above) silence in legislative history does not control unambiguous language of a statute.

Osborne cites (p. 11) United States v. Ron Pair Enterprises, Inc., supra, where in 109 S.Ct. at 1034 the Court said:

> ". . . the statute Congress wrote is simply not subject to a reading that would harmonize it with the supposed pre-Code rule."

There, this court was reluctant to interpret the Bankruptcy Code to effect a major change which is not the subject of at least some discussion in legislative history. However, this court said at the same page:

> ". . . of course, where the language is unambiguous, silence in the legislative history cannot be

controlling."

The statute before this court is unambiguous; therefore, it cannot be read to harmonize with state or other federal law and is unaffected by the alleged silence in history.

Durrett v. Washington National Ins. Co., 621 F.2d 201 (1980), although decided after Congress enacted 11 U.S.C. Section 548, arose under Section 67d of the Bankruptcy Act, then 11 U.S.C. 107(d), and held that a foreclosure sale could be avoided where the bid price was less than the "fair consideration".

Respondents contend that Congress took no action in spite of the 9th Circuit BAP case to the effect that the reasonably equivalent value was established by the foreclosure sale (Osborne p. 14). Congress did not take action to undo Durrett and other circuit courts which have held that the high bid does

not establish the reasonably equivalent value or any irrebuttable presumption with respect thereto.

After the Madrid decision, Congress enacted the Bankruptcy Administration and Federal Judges Act which added to 548 the words "voluntary or involuntary," and to the definition of transfers in section 101 the "foreclosure of debtor's equity of redemption."

To support Respondents' contention that under Section 67d of the Act, proper sales could not be set aside because of the values, they cite Security Mortgage v. Powers, 278 U.S. 149, 154, 156 (1928) (Osborne p. 13). There the dispute was not over avoidability of a sale or powers under Section 67d.

Respondents also cite in In re Soudan Mfg. Co., 113 F. 804, 808-809 (C.A.7th 1902) (Osborne p. 13). There, the issue was whether or not a claim was

secured, not avoidance of a sale.

Neither of the foregoing cases involved "fair consideration" or value. Both were decided before enactment of the Chandler Act which redefined transfers in former 11 U.S.C. 1 to include involuntary transfers.

Respondents cite no case showing that a foreclosure could not be avoided under Section 67 of the Bankruptcy Act; foreclosures could be avoided under that section. See Durrett, supra, and Frank Kennedy, Involuntary Fraudulent Transfers, 9 Cardozo Law Review 531, 547-550 (Appendix H hereto).

Gottlieb v.McArdle, 58 F.Supp. 1523, 1526 (1987) is cited (Osborne p. 28). In setting aside a foreclosure sale it said "federal" law requires "grossly inadequate price" without some other defect. The case under review turns on 11 U.S.C. 101 and 548, not other federal law.

4. PETITIONER DID NOT STATE THAT SECTION 548 REQUIRES MARKET VALUE; HOWEVER IT DOES REQUIRE REASONABLY EQUIVALENT VALUE AND SUCH WAS NOT RECEIVED IN THIS CASE.

Respondent claims BFP's position is that the purchase price was below market value (Osborne, p. 8), that "value" does not mean "market value" (Osborne, p. 9) and that since "reasonably equivalent value" does not mean market value, Petitioner's claim must be denied (Osborne, p. 10).

BFP understands that "value" and "reasonably equivalent value" are different. However, there is less difference than claimed by Respondents. In Ozark Restaurant Equipment Co., 850 F.2d 342, 345 (9th Cir. 1988) in reversing the Bankruptcy Court's determination (that a 7% markup on a sale should have been a 30%) the court remanded for recomputation using a 20% markup; the Court said:

> "Considering all of the factors bearing on the sale, did the debtor receive fair market value for the property. . . . Reasonably equivalent value depends on market conditions faced by a willing seller and a willing buyer. . . ."

In re Grabill Corp., 21 B.R. 983, 994, BLD #68639 (Bkrtcy. N.D.L. 1990) the court said of reasonably equivalent value that:

> ". . . the term means more than the 'consideration' necessary to support a contract. . . . 'reasonably equivalent' requires a comparison of the value of what went out with the value of what was received."

If what debtor receives "approximates" the value it gave, Section 548(a)(2) is satisfied as said in Mellon Bank v. Metro Communications, Inc., 945 F.2d 635 (3rd Cir. 1981), cert. den. (1992) (Osborne p. 7).

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991-92 (2nd Cir. 1981) said indirect benefit satisfied Bankruptcy Act Sec. 67d's requirement of "fair

consideration" provided the "value of the benefit received by the debtor approximates the value" given up.

"Reasonably" has been defined as probably, not possible: Kleinknecht v. Gettysburg College, 786 F.Supp. 449, 453 (M.D. Pa. 1992); Clement v. U. S., 980 F.2d 48, 54 (C.A.1st 1992); O'Dell v. De jeans's Packing Co., Inc., 585 P.2d 399, 402 (Okla. App. 1978). See also People v. Bennett, 58 C.A.3d 230, 238, 129 C.Rptr. 679 (1976).

Osborne concedes that equivalent means equal and yet contends that the bid of $433,600.00 was reasonably equivalent value (Osborne p. 6) without referring to the $725,000.00 alleged value (J. A. p. 59). The foreclosure bid was only 59.8% of said $725,000.00, 61.9% of the $700,000.00 per declaration resisting the Motion for Summary Judgment (J.A. 331) and 65.7% of the resale price,

$660,000.00 (J.A. 351).

The Bankruptcy Court did not consider what price may be reasonably equivalent. It merely ruled that it was bound by In re Madrid, 21 B.R. 423 (BAP 9th Cir. 1982) aff'd on the ground foreclosure is no transfer, 725 F.2d 1197 (CA 9th Cir. 1984) and In re Ehring 91 B.R. 897, (BAP 9th Cir. 1988), aff'd on ground of no preference, 900 F.2d 184. The former held that the high bid at the foreclosure established the reasonably equivalent value and the lead opinion in the latter (on preference under Section 547) that there was no transfer (BFP's Brief p. 45); the 9th Circuit said that foreclosure is a transfer. The bankruptcy judge in the case on review felt bound by the Madrid case as he had ruled in Kachanezadeh, 108 B.R. 734 (1989).

Respondents contend that there was evidence of competitive bidding at the

sale (Osborne p. 19). The only evidence of a bid was the one joint bid by the six Respondents.

Respondents criticize In re Lindsay, 98 B.R. 983, 981, (Bkrtcy. S.D. Cal. 1989) (Osborne p. 19). It is an excellent case on the law involved here. It correctly held that the BAP Madrid case on reasonably equivalent value was not stare decisis; Madrid was not final when appealed; it was affirmed only on another ground. In accord on stare decisis, In re Verna, 58 B.R. 246. If Lindsay erred on the law of stare decisis, it is no less persuasive.

The Respondents erroneously assert that Petitioner's bankruptcy schedules were before the court (Osborne p. 18-19). They were not before the Bankruptcy Court, although they were injected in Respondents' Appendix in the District Court (J.A. pp. 33-38).

Respondents state that Petitioner submitted no appraisals. Many cases say that the factors to be considered in determining if reasonably equivalent value was received (Osborne p. 19) include whether the foreclosing party obtained an appraisal, advertised, whether competitors' bidding was encouraged, and whether there was competitive bidding, e.g. see In the Matter of Bundles, 856 F.2d 815, 824 (7th Cir. 1988). Actually, the circumstances relevant are those showing the debtor's benefits and burdens (to measure values). See In re Vadnais Lumber Supply, Inc., 100 B.R. 127; Rubin v. Manufacturer's Hanover Trust Co., 661 F.2d 979 (2nd Cir. 1981).

That by foreclosing, the creditor is enforcing a procedure for "establishing the value" (RTC p. 16) is untrue. The creditor is trying to take the property or proceeds of sale without establishing

the value.

5. CASES HOLDING THAT THERE IS A PRESUMPTION IN FAVOR OF FORECLOSURES IN AN ACTION TO AVOID UNDER 11 U.S.C. 548 SHOULD BE DISAPPROVED; ANY INFERENCE OR PRESUMPTION SHOULD BE BASED ONLY ON THE RATIO OF BID TO VALUE OF PROPERTY.

Many misguided cases hold that there is a rebuttable presumption (and a few an irrebutable presumption) that the price paid at a foreclosure sale was the reasonably equivalent value under 11 U.S.C. Section 548. The better view is expressed in In re Steffens, 148 B.R. 144 (Bkrtcy. W.D. 1993) saying the court was:

> "neither prepared nor disposed to accept the premise that any regularly conducted foreclosure sale is prima facially immune from attack under Section 548(a)(2)."

The foreclosure sales price is not evidence of value. Wolf v. Aero Factors Corp., 126 F. Supp. 872, 878-79 (S.D.N.Y. 1954).

Under California law, on proof of a

substantial debt, a presumption of insolvency and lack of "fair consideration" arise: In re Consolidated Capital Equity Co., 143 B.R. 80, 87 (Bkrtcy N.D. Texas 1992).

The existence of a presumption, (even rebuttable) depends upon a rational nexus between proven fact and the presumed fact as held in Manley v. Georgia, 258 U.S.1, (1928) invalidating a criminal law (saying the rule applied to property), United Scenic Artists Local 829 v. N.L.R.B., 762 Fed.2d 1027, 1034 (DC Cir. 1985) in invalidating a presumption created by the National Labor Relations Board and Purifory v. Mercantile Safe Deposit and Trust Co., 398 F.S. 1082, 1085 (1955).

Arizona v. Maricopa County Medical Svc., 457 U.S. 332, 344-48 (1982) and Drabkin v. A. I. Credit Corp., 800 F.2d 1153 (D.C. Cir. 1986) (Fed. Home p. 16,

f.n. 15) both involved courts' experience that the presumed fact existed if the proven fact existed, reasons not present here.

It is contended that the value of the distressed property is the high bid (Fed. Home p.8; RTC p. 13; Am. Home p. 3) and value is in the context of the type of transaction (Fed. Home p. 11). Buyers know that debtors on a trust deed may cure defaults and reinstate the note, may stay a sale by agreement with the beneficiary, filing bankruptcy or otherwise. Few research the values, keep the same plans after continuances, and bring sufficient cash to bid the approximate value. Barrett v. Commonwealth Federal Savings Ass'n., 939 F.2d 20 (3rd Cir. 1991) said that the fact that foreclosure sales bring less than negotiated sales justifies tolerating a low price in foreclosure sales. The proper inference

from that fact is that foreclosure sales should be viewed with suspicion.

It is argued that there is no statutory authority for the 70% guidelines of Durrett v. Washington National Insurance, supra (Walter, p. 18,20). Neither is there any statutory authority for a presumption, even rebuttable, that the high bid at a foreclosure sale is reasonably equivalent value. The statute specifically states that the trustee has the power to avoid "any transfer" if reasonably equivalent value was not received and other requirements are present.

In United States v. Provident Trust Co., 291 U.S. 272, 284-86 (1934), in determining the value of a remainder to a charity subject to a life estate for lawful issue of a woman who after surgery was incapable of bearing a child, this court cited Wigmore, Ev. 2d. Ed. that the

basis for irrebuttable presumptions is avoidance of injury more important than the truth of a matter and said:

> ". . . we well may assume that Congress could not have meant to leave its aim [encouragement of charitable bequests] to be diverted by a purely arbitrary presumption, which whether applicable or not to sustain another or different policy, would deny the truth and subvert the policy of this particular legislation."

and that a bidder for the interest left to charity would consider the possibility of child bearing as destitute of reason.

31A C.J.S. 212, Section 117 Evidence states:

> "Presumptions of law may be created by statute if there is some justification of public policy, or a rational connection between the fact provided and the fact presumed."

In Heiner v. Donnan, 285 U.S. 312, 329 (1931) this court held that, although Congress could tax transfers within two years of death, it could not enact a conclusive presumption that transfers

within two years of death are in contemplation of death.

Certainly a court should not create a presumption unless the rational connection with the proven bid exists. Here, the rational presumption is that foreclosures do not establish value.

Having guidelines and logical presumptions may encourage bidding of a reasonably equivalent value. Appropriate rules include: (1) there is no presumption of reasonably equivalent value in a foreclosure sale of a single family dwelling for less than 80% of market value, (2) such a sale for less than 70% is (or is presumed to be) for less than reasonably equivalent value and (3) a sale for less than 85% of value and lack of requested notices of continuance or other circumstances referred to in F hereof make the sale voidable.

C. IF THE PURPOSE OF 11 U.S.C. 548 IS TO BE CONSIDERED, INCLUSION OF FORECLOSURES IS CONSISTENT AND EXCLUSION OF FORECLOSURES INCONSISTENT WITH THAT PURPOSE.

As shown in B.1 and B.2 above, the language of the statute under certain circumstances "any transfer" not for reasonably equivalent value may be avoided includes foreclosures without considering the purpose of the statute. However, Respondents argue the purpose. A purpose of 11 U.S.C. 548 is to bring property into the estate so that it may be distributed equitably to the creditors. Also avoiding a transfer of exempt property gives the debtor a fresh start (See J below). Those purposes are served by avoiding sales for less than reasonably equivalent value.

Since bids on foreclosure sales are generally low (B.4 above) application of 11 U.S.C. 548(a)(2) will not significantly discourage bidders.

Even under state law, emphasis on intent has changed to objectivity (see excerpts from Frank Kennedy, Appendix H hereto).

D. UNOPPOSED; NOT REARGUED HEREIN.

E. FORECLOSURE IS A TRANSFER.

In the matter under review, the Ninth Circuit did not discuss whether a foreclosure is a transfer. Respondents' do not state that this is a question to be reviewed. As said in B.2 above, some argue that by 11 U.S.C. 548(a)(2) Congress did not intend the bankruptcy trustee to have any right to avoid other than the right under state fraudulent conveyance laws. Do they mean there was no transfer?

From 1/1/1940 to 1/1/1987, the UFCA, and Cal. Civil Code Section 3439.04 provided that "any conveyance made" without fair consideration, while insol-

vent, is fraudulent as to creditors (Appendices C and D). Neither California law before 1987 nor the UFCA expressly include voluntary transfers. By contrast, 11 U.S.C. 548(a)(2) refers to "any transfer" of an interest of debtor in property (not limited to "transfers made") (and, after 1984 specifically refers to "involuntary"), if debtor receives less than reasonably equivalent value; 11 U.S.C. 101 states that "involuntary" transfers are included (and after 1984, specifically "foreclosure of debtor's equity of redemption"). Durrett v. Washington Nat. Ins. Co., supra, at 204 quoted from 1 Collier on Bankruptcy, Section 130 at 130.28 (2)(3) (14th Ed. 1967) that transfer in Bankruptcy Act Section 67 "'. . . includes surrender of possession.'"

While Section 101 does not expressly state that parting with possession is a

transfer, it does expressly include debtor's "parting with property or with an interest in property"; the right of possession and the equity subject to a mortgage are interests in property.

In re Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985) cited on the issue of reasonably equivalent value (RTC p.7; Osborne p. 13, 16, 23, 24; Fed. Home pp. 4, 14; Council of States pp. 3-7; Walter p. 20) held that a foreclosure is no transfer. Even the 9th Circuit now disagrees with Winshall on that point, In re Ehring, 900 F.2d 184 (9th Cir. 1990), because of the BAFJA amendments to Sections 101 and 548. Even prior to BAFJA, to say that the loss of title and the right to possession was no transfer, defied the statute.

This court held that whether a transaction is a transfer under the Bankruptcy Code is decided by federal

law, Barnhill, supra (as was true of transfers under the Bankruptcy Act, McKenzie v. Irving Trusts, supra).

F. THE FORECLOSURE SALE SHOULD BE AVOIDED UNDER THE EXCEPTION RECOGNIZED IN THE BAP MADRID DECISION.

Respondents argue that federal bankruptcy law should be the same as state law on mortgage foreclosures (Osborne p. 17, 20). As said in Central Bank of California v. Bell, 5 C.2d 324, 328 (1936) (Osborne p. 7, 13, 17) even under state law, "inadequacy of compensation is not sufficient ground for setting aside a trustee's sale legally conducted, in the absence of some elements of fraud, unfairness or . . .". To complete the partial quote from Graffam v. Burgess, 117 U.S. 180 (1885) (Am. Council, pp. 11, 13) the nonbankruptcy rule is "inadequacy is so great as to shock the conscience or unless there be additional circumstances

against its fairness". Madrid, supra (BAP) stated a similar rule.

In this case, the Complaint alleged (BFP Brief, pp. 12-13) and the declarations opposing the summary judgment proved (BFP Brief p. 17-18, 20-21), that less than two-thirds of value was bid, requested and promised notice of the continued sale date was not given (J.A. p. 58-59), Imperial concealed its moving ahead to foreclose (J.A. 53-55), the junior lien holder had advanced $31,276.54 (J. A. p. 335) to reinstate a prior default (J. A. p. 57) and told Imperial that he would reinstate but would delay awaiting determination of title (J. A. 334). The foregoing in addition to characteristically low prices on foreclosures (p. 30 herein) constitute unfairness under 11 U.S.C. 548(a)(2).

Gottlieb v. McArdle, supra, at 1526, avoided a foreclosure saying proof of

unfairness was not required under federal law and failure to notify of a continued date was unfairness under state law.

G. UPON AVOIDING A SALE UNDER 11 U.S.C. 548, THE COURT MAY GRANT OTHER RELIEF THAN RESTORATION OF TITLE; BFP'S CLAIM IS NOT MOOT.

It is contended that the proceeding is moot (Osborne, p. 4, f.n. 2). The basis of mootness is an event which

> ". . . renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever . . . "

Matter of Combined Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977). Respondents do not dispute that other relief is available (BFP's Brief, p. 48).

In Armster v. United States District Court, 806 F.2d 1347 (9th Cir. 1986). At page 1354 the Court said:

> "Courts of Appeal dismiss cases having become moot between the time of the ruling below and the issuance of an appellant decision because the requirement that Article III of the Court decide only 'cases or controversy.'" (Emphasis added) p. 1354.

Here, the sale occurred before the Bankruptcy Court ruled on the motion to dismiss the complaint (J. A. p. 351). The resale occurred only six days before the hearing on the Motion to Dismiss. Perhaps Respondents concealed it out of fear that BFP would amend to seek recovery of the resale proceeds.

There is no requirement that plaintiff pray for value. Although not discussing pleadings, In re International Ski Service, Inc., 119 B.R. 654, 656 (Bkrtcy. W.D. Wis. 1991) quoted a text to the effect that the option of recovery of value of the property is "apparently now given to the court" rather than the trustee as it was under former Section 60 of the Bankruptcy Act. It said that, where property is unrecoverable, the courts allow recovery of value (p. 658).

H. UNOPPOSED; NOT REARGUED HERE.

I. THE REMOVAL BY THE FORECLOSURE OF THE LIEN OF THE JUNIOR DEED OF TRUST IS NO BENEFIT TO PETITIONER AND IS NOT CONSIDERED AS VALUE RECEIVED.

The elimination of the second trust deed was no benefit to BFP; BFP lost the property. In re Davis, 148 B.R. 165, 174-175 (Bkrtcy. E.D. N.Y. 1992) held that such is not counted as consideration received.

J. THE PROPERTY IN THIS CASE IS NOT EXEMPT FROM CLAIMS OF CREDITORS; TRANSFERS OF EXEMPT PROPERTY ARE AVOIDABLE UNDER 11 U.S.C. 548.

It is argued that transfers of exempt property cannot be avoided. (Walter, p. 13-17 and 25). The argument has no merit for several reasons.

First, 11 U.S.C. 522 provides that an "individual debtor may" exempt certain property. A partnership is not entitled to exemptions. California exemptions are available only to a "natural person",

Section 703.020 Cal. Code of Civil Procedure; also, a homestead is the "personal dwelling" in which the debtor or his spouse reside; Section 704.410(c) Cal. Code of Civil Procedure. In Lockwood v. Exchange Bank, 190 U.S. 294 (1903), cited as showing a transfer of exempt property cannot be avoided, an individual, not a partnership, owned the property. Also Section 67 of the Bankruptcy Act, specifically provided that property fraudulently conveyed if "not exempt . . . by the law of his domicile be and remains part of the assets and estate of the bankrupt." Lockwood pointed out that, under the Act, exempt property did not pass to the representative in bankruptcy (190 U.S. at 299, 300). Present law is that "an individual debtor may exempt from property of the estate, . . ." (11 U.S.C. 522(b)) (Appendix B).

Secondly, Section 522(f) provides

that a debtor may avoid an involuntary transfer voidable under 548 to the extent debtor could have exempted the property under 522(g)(1) and proceeds of exempt property recovered may be exempted under 522(h).

A Chapter 7 debtor can avoid a tax sale if the property could be homesteaded and the trustee does not avoid it In re McKeever, 132 B.R. 996, 1004 (Bkrtcy. N.D.L. 1991). Homesteaded property can be brought into a Chapter 13 estate. In re Davis, supra at 176. Thus, a clear purpose of the Code 11 U.S.C. 522 is to bring even exempt property into the estate for a debtor's benefit.

K. EVEN IF THE BANKRUPTCY COURT WERE BOUND BY MADRID, THIS HONORABLE COURT IS NOT.

A Respondent contends that the Bankruptcy Court was bound to follow Madrid (Osborne p.21). See BFP's analysis at page 26 hereinabove.

In Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470 (4th Cir. 1990) (Osborne p. 21) it was held that the District Court was not bound by BAP decisions (see also Appendix G hereto).

This Court is not bound by stare decisis of a lower court decision. Madrid should be disapproved.

CONCLUSION

The judgments should be reversed and the case remanded with directions to deny the motions. Also, it would be appropriate to establish guidelines suggested in B.5 above.

Dated: September 25, 1993.

RESPECTFULLY SUBMITTED,

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Attorney for Petitioner

D114:BFPSC.P97

APPENDICES

APPENDIX A

PERTINENT PARTS OF

FORMER BANKRUPTCY ACT (PRIOR TO 1978)

Section 1 of the Act, 11 U.S.C. Section 1, provided in pertinent part:

The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * *

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance,

gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

* * *

Section 67d of the Act, 11 U.S.C. 107(d) provided in pertinent part, with [__] to show changes in 11 U.S.C. 107(d):

(1) For the purposes of, and exclusively applicable to, this subdivision d:

* * *

(e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred

* * *

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a)

as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent;

* * *

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this [title] Act, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value.

* * *

APPENDIX B

PERTINENT PART OF

BANKRUPTCY CODE (1978) as amended

11 U.S.C. 522

* * *

Exemptions

(a) In this section --

1) "dependent" includes spouse, whether or not actually dependent; and

2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property o the estate after such date, as of the date such property becomes property of the estate.

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under

section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) Any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case of

any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except --

(1) a debt of a kind specified in section 523(a)(1) or 523 (a)(5) of this title;

(2) a debt secured by a lien that is

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions

regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item or $4,000 in aggregate value, in household furnishings, household goods,

wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

* * *

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section is such property had not been transferred, if --

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided

such transfer under subsection (f)(2) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section.

(1) such transfer is avoidable by the trustee under sections 544, 545, 547, 548, 54, or 724(a) of this title or recoverable by the trustee under Section 554 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered

under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (h) and (e) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts

under this section is not liable fore payment of any administrative expense except --

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt

from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

11 U.S.C. 542

Sec. 542. Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title [11 U.S.C. Sec. 363], or that the debtor may exempt under section 522 of this title [11 U.S.C. Sec. 522], shall deliver to the trustee, and account for, such property or the value of such property,

unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of the trustee, except to the extent that such debt may be offset under section 553 of this title [11 U.S.C. Sec. 553] against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title [11 U.S.C. Sec. 362(a)(7), an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the

trustee, with the same effect as to the entity making such transfer or payment as if the case under this title [11 U.S.C. Secs. 101, et seq.] concerning the debtor had not been commenced.

11 U.S.C. 544

Sec. 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

* * *

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. 548

Sec. 548. Fraudulent transfers and obligations

[See p. 69-70, Appendix to Amended Petition for Writ of Certiorari]

11 U.S.C. 550

550. Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b) or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from --

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from --

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the

voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of --

(A) the costs, to such transferee, or any improvement made less the amount of any profit realized or accruing to such transferee from such property; and

(B) any increase in value as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes --

(A) physical additions or

changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of trustee;

(E) preservation of such property.

(e) An action or proceeding under this section may not be commenced after the earlier of --

(1) One year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

APPENDIX C

UNIFORM FRAUDULENT CONVEYANCE ACT

An Act concerning fraudulent conveyances and to make uniform the law relating thereto.

1918 ACT

* * *

Sec. 1. Definition of Terms.

In this act "Assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

* * *

Sec. 4. Conveyances by Insolvent.

Every conveyance made and every

obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

* * *

APPENDIX D

PERTINENT PARTS OF

CALIFORNIA UNIFORM FRAUDULENT

CONVEYANCE ACT (CAL. CIV. CODE)

(adopted 1939, repealed effective 1-1-87)

Sec. 3439.01. Definitions.

In this act "Assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

* * *

.Sec. 3939.03. Fair consideration.

Fair consideration is given for property, or obligation:

(a) When in exchange for such property,

or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Sec. 3439.04. Conveyances by insolvent.

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

APPENDIX E

UNIFORM FRAUDULENT TRANSFER ACT

Section 1. Definitions.

* * *

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other incumbrance.

* * *

Section 3. Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promiser's business to furnish support to the debtor or another person.

(b) For the purposes of Sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

* * *

Section 5. Transfers Fraudulent as to Present Creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the

transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

APPENDIX F

PERTINENT PARTS OF

CALIFORNIA UNIFORM TRANSFER ACT

IN THE CALIFORNIA CIVIL CODE

(EFFECTIVE 1/1/87 TO PRESENT)

* * *

Sec. 3439. Citation of chapter. This chapter may be cited as the Uniform Fraudulent Transfer Act.

* * *

Sec. 3439.01. Definitions. As used in this chapter the following definitions are applicable:

* * *

(i) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

* * *

Sec. 3439.03. Value for transfer or obligation. Value is given for a transfer or an obligation if, in exchange for the transfer or obliged property is transferred or an antecedent is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promiser's business to furnish support to the debtor or another person.

* * *

Sec. 3439.04. Transfer with intent to defraud; a transfer not given in exchange for value. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(a) With actual intent to hinder, delay, or defraud any creditor of the

debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

* * *

Sec. 3439.05. Transfer resulting in debtor's insolvency. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably

equivalent value in exchange for the transfer or obligation and the debtor became insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

***

Sec. 3439.07. Creditor's remedies.

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

1. Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

2. An attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in Title 6.5 (commencing with Section 418.010) of Part 2 of the Code of Civil Procedure.

3. Subject to applicable principles of equity and in accordance with applica-

ble rules of civil procedure, the following:

* * *

(C) Any other relief the circumstances may require.

* * *

Sec. 3439.08. When transfer not voidable; Amount of judgment; Remedies of good faith transferee.

(a) A transfer or an obligation is not voidable under subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, the creditor may recover judgment for the value of the asset transferred, as adjusted under subdivi-

sion (c), or the amount necessary to satisfy the creditor's claim, whichever is less.

* * *

APPENDIX G

Excerpts from Reply Brief of Petitioner in District Court, pages 9-13:

* * *

In re Windmill Farm, Inc., 70 B.R. 618, 622 (9th Cir. BAP 1987) involved the right of a debtor to assume a lease claimed to have been terminated under state law. There the court said:

> "The Bankruptcy Appellate Panel which was established under the authority of 28 U.S.C., Section 158(b) is also an intermediate appellate body."

* * *

> One of the reasons for establishing the BAP was to provide a uniform and consistent body of bankruptcy law throughout that entire Circuit. In order to achieve this desired uniformity, the decisions of the Bankruptcy Appellate Panel must be binding on all of the bankruptcy courts from which review may be sought, i.e., each district in the Ninth Circuit . . ."

Windmill Farms only holds that the bankruptcy courts, not District Courts, must follow the BAP.

Since Appellees do not discuss the basis or breadth of stare decisis, we turn to 3 Moore's Manual, Federal Practice and Procedure, pages 30-5, Section 30.02(1), saying:

> "The rule, as developed in the English law, is that a decision on an issue of law embodied in a final judgment is binding on the court that decided it and such other courts as owe obedience to its decision, in all future cases"
>
> The American law has never embraced this strict construction of the doctrine of the stare decisis. The Supreme Court very early asserted its prerogative to change its mind,[1] and has done so many times, sometimes with respect to is-sues settled by repeated decisions over the course of many years.[2] Nor have the lower courts shrunk from change when they have found it to be appropriate.[3] Nevertheless, the concept of controlling precedent plays an important role in American litigation, for while the power exists in the court that decides a case to overrule it, a court has no obligation to reconsider settled points . . ."

In footnote 1 Moore cites Helvering v. Hallock, 309 U.S. 106, 121, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

Moore cites, in support of the rule that the Supreme Court can change its mind, Schaffer v. Heitner, 544 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). In 53 1.Ed. at page 703 in footnote 39, the court said "to the extent that prior decisions are consistent with this standard, they are overruled."

In Moore page 30-6, Moore said:

> "Stare decisis applies not only to successive decisions in the same court, but also to decisions in courts owing obedience to that court. In this context, the principle of conformity is more rigid. All other American courts, state and federal, owe obedience to the decisions of the Supreme Court of the United States.
>
> ". . .on questions of federal law, and a judgment of the Supreme Court provides the rule to be followed in all such courts until the Supreme Court sees fit to reexamine it.
>
> In like fashion, the district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and must follow it until the court of appeals sees fit to overrule it."

Note how carefully Moore states the

rule with respect to lower courts as courts which owe obedience to the higher court who made the decision. In this case, the appeal from the Bankruptcy Court could have been to the Bankruptcy Appellate Panel. The Bankruptcy Court below felt it owed obedience to BAP. Were the appeal in this case before the BAP, it could consider whether or not to overrule its grounds of decision in Madrid, 21 B.R. 424 (that the foreclosure sale establishes the reasonably equivalent value of the property). But there is no appeal from this court to the BAP.

The BAP Madrid decision is contrary to the law. Aside from that, the decision is not binding as stare decisis because:

First, the Ninth Circuit Court of Appeals has not decided the issue confronting this court (does the foreclosure sale establish the reasonably equivalent

value?). The Ninth Circuit had a chance to in Madrid, 725 F.2d 1197. However, it did not consider the ground of the BAP decision in Madrid, and affirmed the decision on another ground, that is, that there was no transfer, a matter Congress has clearly taken care of. Ninth Circuit's affirming the decision on entirely different grounds (no transfer) suggests the probability that the Ninth Circuit Court of Appeal doubted the wisdom and propriety of interpreting the law as the BAP decision did (doubted that the transfer by foreclosure establishes the reasonably equivalent value).

Second, this court is not a bankruptcy court and is not bound to the BAP opinion on principles of stare decisis. This could should decide the issue based on independent thinking considering the BAP Madrid decision only to the extent it may be persuasive.

Third, the 1984 change to 11 U.S.C. Section 101(48), now 101(50), changed the result in the Madrid Ninth Circuit decision and was obviously intended to undo the result of the BAP Madrid decision as shown in the discussion below.

For the third and part of the first reason above, we feel that the Lindsay decision did not err in ignoring the alleged stare decisis effect of the BAP decision in Madrid. Even if the bankruptcy court in the Lindsay case (appealable to BAP), erred in ignoring the stare decisis effect on bankruptcy courts of the BAP's decision in Madrid, that does not make its opinion on the meaning of 11 U.S.C. 548 any less logical. It is a very persuasive brief for the appellants in this case. The Verna decision, which followed the BAP decision, itself considered the BAP decision in Madrid to be only persuasive and not binding on it.

To that extent Verna was correct, but then Verna followed the illogical legal fiction that the bid at the foreclosure sale establishes the reasonably equivalent value for the transfer.

APPENDIX H

Excerpts from Involuntary Fraudulent Transfers by Frank R. Kennedy, 9 Cardoza Law Review 531:

[p. 532]

INTRODUCTION

* * *

It is the thesis of this Article that Durrett was not wrong in holding that a foreclosure sale is a transfer under the bankruptcy laws and that the "Durrett doctrine" is not so novel as Judge Clark's dissent and its progeny suggest.[6]

* * *

[p. 534]

If an economic system employing credit is to function efficiently, creditors must be able to enforce obligations assumed by or imposed on their debtors. The law of fraudulent and preferential transfers consists of rules that have developed to enable creditors to enforce

the duty of a debtor to be fair to all creditors. If a debtor, who is or may be unable to satisfy all of his or her creditors, makes a disposition that will be unduly prejudicial to one or more of his creditors, the injured creditor is enabled to avoid the disposition to permit the collection of his or her claim. If the debtor's disposition constitutes no more than a preference---gives a creditor-transferee no more than full payment or satisfaction---other creditors cannot avoid the transfer unless the avoidance benefits all creditors injured by the transfer. A rule that would allow one creditor to obtain a preference by going to court to take away another's preference would be difficult to justify. For that reason, the avoidance of preferences has generally been a creditor's remedy available only when invoked under a

bankruptcy law that provides for equitable distribution of a debtor's estate.

When a debtor in financial stringency, present or foreseeable, makes a disposition that is not merely preferential but is intentionally fraudulent or results in a transfer that is not matched by any equivalent consideration received by the debtor, an injured creditor acting alone is allowed to avoid the prejudicial transfer. Whenever any creditor has a right to avoid a debtor's transfer under nonbankruptcy law, however, the bankruptcy laws have uniformly authorized avoidance on behalf of the injured creditor group by their representative when the debtor's estate is administered under those laws.

In their initial formulation, the rules applicable to fraudulent and preferential transfers appeared to require a mental state on the part of the transferor,

transferee, or both before a transfer could be avoided. As the discussion that follows demonstrates, an observable tendency [p. 535] of the laws governing both kinds of transfers has been to de-emphasize or eliminate the role of the participants' mental states and to make the effect of the transfer and the timeliness of the attack the critical elements of the avoidance action. The Durrett doctrine is thus wholly consonant with the course of development of creditors' remedies against injurious transfers of their debtors' assets. The participants' mental states can hardly have any relevance in considering the efficiency and appropriateness of the remedy from the viewpoint of the creditors intended to be protected by the rules governing fraudulent and preferential transfers. The transferee's mental state and the timeliness of the avoidance

have a legitimate bearing on the fairness of the avoidance to the transferee, but the diminution of the significance of the transferor's intentions is a reflection of a logical and reasoned approach to the enhancement of the role of creditors' remedies against fraudulent and preferential transfers.

* * *

[p.537]

C. The Objectification of Fraudulent Intent Under the Statute of 13 Elizabeth

* * *

While every statute derived from the Statute of 13 Elizabeth reaches transfers made "with intent to hinder, delay, or defraud creditors," legislative codification of the law of fraudulent transfers has generally added provisions particularizing circumstances that warrant [p. 538] avoidance of certain transfers

without regard to the parties' intent.[26] From the earliest cases the courts applying the Statute of 13 Elizabeth have recognized that fraudulent intent is rarely susceptible of direct proof[27] and that the statute's reach should not be limited to particular forms of transfers.[28]

Contrary to the suggestion that constructively fraudulent transfers are the product of the twentieth-century imaginations of the UFCA draftsmen, there is considerable case law in England and America going back over 200 years avoiding certain transfers as fraudulent without regard to the evidence of the transferor's actual intent. Thus, in Townsend v. Windham,[29] decided in 1750, Lord Hardwicke declared that "[a] man, actually indebted, and conveying voluntarily, always means to be in fraud of creditors."[30] This was the English rule

for more than 100 years,[31] and it has been followed in a number of American jurisdictions where the UFCA has not established a less drastic rule.[32] The leading American case was Reade v. [p. 539] Livingston,[33] where Chancellor Kent expounded its rule in the following terms:

> "[I]f the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law, in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party."[34]

D. The Uniform Fraudulent Conveyance Act

So harsh a doctrine is hardly congenial in a credit economy, where a member of society is likely to be entirely debt free. Indeed, many charitable institutions depend on the largess of private

citizens, and intrafamily giving on certain occasions and at certain seasons is a deeply entrenched practice. The legislature of New York reacted against the harsh rule of Reade v. Livingston by attempting to impose a rigid requirement that the question of fraudulent intent should be "deemed a question of fact and not of law."[35] That legislative effort was foredoomed to failure,[36] but the legislative approach taken in the UTCA proved more successful.

* * *

"Conveyance" was defined to include every transfer of property [p. 540] "and also the creation of any lien or incumbrance."[39] Nothing in the language of the UFCA or the comments of the draftsmen that accompanied its promulgation indicated an intent to preclude application of its avoiding provisions to an involuntary transfer. The decisions covered

involuntary transfers,[40]

Footnote 40 reads as follows:

> See. e.g., Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) ("A transfer effected on execution sale may be as fraudulent on creditors as a transfer made by the debtor's own volition, where the effect is to hinder, delay, and defraud creditors."); Catabene v. Wallner, 16 N.J. Super. 597, 601-02, 85 A.2d 300, 302 (App.Div. 1951) (mortgage foreclosure); Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 143-45, 27 N.E.2d 814, 817 (1940) (upholding application of the UFCA to a complaint alleging constructive fraud accomplished through judicial proceedings, including a foreclosure sale and appintment of a receiver of the judgment debtor's assets); Langan v. First Trust & Deposit Co., 277 A.D. 1090, 101 N.Y.S.2d 36 (1950), aff'd, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Zakheim v. Dry Harbor Homes, Inc., 245 A.D. 769, 770, 281 N.Y.S. 153, 154 (1935) (foreclosure sale); cf. Shapiro v. Wilgus, 287 U.S. 348, 354-55 (1932) (transfer of individual debtor's assets to newly created corporation followed by equity receivership obtained by creditor and debtor held to be fraudulent transfer under both UFCA and Statute of 13 Elizabeth); Toner v. Nuss 234 F.Supp. 457, 461-62 (E.D. Pa. 1964) (pre-UFCA Pennsylvania law applied to avoid sheriff's sale as fraudulent in view of purpose of creditor's principal to defraud other creditors). But cf.

Merriam v. Wimpfheimer, 25 F.Supp. 405, 407 (S.D.N.Y. 1938) (denying relief to a creditor seeking recovery of stock sold on foreclosure of a pledge, in part on the ground that "[t]he laws of New York . . . require a voluntary act by the transferor to constitute a conveyance" and in part for the reason that the sale was for a fair consideration).

The court in Catabene, 16 N.J. Super. at 601, 85 A.2d at 302, answered the defendant's challenge to the right of the creditor or the trustee to attack a judgment as follows: "Even though it is a judgment of a legally organized judicial tribunal, proceeding within the scope of its allotted powers and possessing the requisite jurisdiction over the subject matter of the suit and the parties thereto, it may be collaterally attacked when the judgment is procured through the fraud of either of the parties or by the collusion of both for the purpose of defrauding a third person."

* * *

[p.541]

II. AVOIDANCE IN BANKRUPTCY

A. The Bankruptcy Act of 1898 and Its Antecedents

The original function of bankruptcy,[45] and one still frequently identified as

its principal role,[46] is to provide for and regulate equitable distribution of a debtor's estate. Avoidance of transfers under the Roman law has been viewed as an adjunct to the Roman system of collective execution.[47] Although English and American law have per- [p. 542] mitted the avoidance of certain transfers independently of any provision for a general distribution, it has not been conceived that any workable bankruptcy law would fail to include provisions for the avoidance of transfers of the debtor's property. Indeed, English bankruptcy legislation antedating the Statute of 13 Elizabeth authorized the recovery of fraudulently transferred property for application to the payment of the transferor's debts.[48] While the avoidance of preferences is not ordinarily available as a creditor's remedy in the absence of a provision for redistribution of the

debtor's estate to all creditors, the avoidance of fraudulent transfers has been recognized as no less indispensable than the avoidance of preferences in Anglo-American bankruptcy laws. Indeed, the first American Bankruptcy Act did not mention preferences although it made fraudulent conveyances voidable.[49] All subsequent bankruptcy acts enacted by Congress have authorized the avoidance of both preferential and fraudulent transfers.[50]

A fraudulent transfer has not only been voidable under all our bankruptcy legislation, but, until 1979, the making of such a transfer was also a ground for commencing an involuntary bankruptcy case against the transferor.[51] The trustee in bankruptcy has been author- [p. 543] ized under both the Bankruptcy Act of 1898 and the Bankruptcy Reform Act to seek avoidance of a fraudulent transfer under

either of two statutory provisions; one establishing a federal standard of voidability, [52] and the other incorporating by reference any non-bankruptcy law rendering a transfer voidable by a creditor of the estate.[53] Other sections of the Bankruptcy Act of 1898 authorized the [p. 544] trustee to avoid preferential transfers.[54] Congress has manifested a consistent purpose to give a broad meaning to its use of the word "transfer" in the several sections where it appears in the bankruptcy laws.[55] For years, the courts frustrated the congressional purpose to [p. 545] strike at secret transfers as subversive of bankruptcy policy,[56] but the Supreme Court early accorded sympathetic treatment to the congressional definition of "transfer." The classic statement of the definition was made by the Court in Pirie v. Chicago Title & Trust Co.; "The word is used in

its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished . . . ."[57]

In particular, the courts recognized that the term embraced an involuntary as well as a voluntary disposition.[58] When the Bankruptcy Act of 1898, in describing an act of bankruptcy, required a transfer to be effected by the debtor with a specific intent to prefer or defraud, the courts regarded the statute to be satisfied when a creditor obtained a lien or title by pursuing a judicial remedy while the debtor remained quiescent.[59]

[p. 546]

Liens created by judicial proceedings on the eve of bankruptcy have been viewed as a particularly offensive variety of transfer under both English and American

bankruptcy law.

* * *

When a judicial lien was enforced by a sale before the filing of a petition by or against the debtor, however, it was no longer vulnerable as such, but the resulting transfer to the purchaser was properly held subject to challenge under one of the avoidance sections directed at transfers.[61] When a New York court held that a garnishee execution on the eve of bankruptcy was not voidable as a preferential transfer since there was no voluntary action on the part of the debtor,[62] the Court of Appeals for the Second Circuit promptly repudiated the interpretation in the following terms: "The bankrupt's inaction from the time of levy of execution to the time of the sale indicates sufficiently his participation, so that he 'made the transfer.'[63]

[p. 547]

B. The Chandler Act

The Prefatory Note accompanying the UFCA recognized not only the desirability of national uniformity in the law of fraudulent transfers but also the desirability of compatibility with the provisions of the bankruptcy laws applicable to fraudulent transfers.[64] This view was dramatically reciprocated by the draftsman of the Chandler Act that overhauled the Bankruptcy Act in 1938.[65] At the same time, the definition of "transfer" was amended to make explicit the intention to include an involuntary transfer.[66] The narrower definition of "conveyance" in the UFCA was not incorporated into section 67d since the expanded definition of "transfer" was intended to apply in proceedings under section 67.[67]

Cases applying the fraudulent transfer provisions of the Chandler Act to involuntary transfers include Britt v. Damson,[68] [334 F.2d 896 (4th Cir. 1964) cert. den. 379 U.S. 966 (1965)] a decision by the Court of Appeals for the Ninth Circuit.[69] That court held that [p. 548] section 67d(2) of the Bankruptcy Act, the precursor of section 548(a)(2) of the Bankruptcy Code ("Code"), rendered an award by a divorce decree voidable as a fraudulent transfer to the extent that the bankruptcy husband did not receive fair consideration.[70]

In Wolf v. Aero Factors Corp., [71] a trustee in bankruptcy attacked an execution sale and a foreclosure sale of repossessed chattels by a mortgagee held within three months of the debtor's bankruptcy. Both sales were of the same chattels, and the purchaser at each sale was acting for the chattel mortgagee. The execution sale produced a bid of $100 and the foreclosure sale brought $500. The same chattels were sold by mortgagee

within four days after the bankruptcy for $8,500. On findings that the execution sale was preferential, that the foreclosure sale was "unfair and irregular," and that the fair market value of the property involved was $8,500, the court allowed the [p. 549] trustee to recover a sum from the chattel mortgagee representing the value it had received in excess of the debt for which it held valid security.[72] Both sales were apparently noncollusive, and the execution sale seems to have been regularly conducted. Since the foreclosure sale was held on the same day as the publication of the only notice, the purchase was made by an agent of the foreclosing mortgagee, and the bid was found to be less than 10% of the fair market value of the chattels sold, the sale did not meet a state law requirement that the mortgagee "act in good faith, obtaining as far as possible the fair

market value of the property."[73] Although the court did not invalidate the foreclosure sale as a constructive fraud, its disposition of the case was wholly consistent with that subsequently reached in Durrett.[74] Wolf is a good illustration of the utility of the broad definition of "transfer" in the Bankruptcy Act to reach both the sale on execution and the nonjudicial foreclosure.[75]

In Warner v. Dworsky,[76] the trustee in bankruptcy challenged under section 70e of the Bankruptcy Act, transfers for inadequate consideration made by the assignees for the benefit of the creditors to whom the debtor had been induced by false representations to make an assignment for the benefit o the creditors. The district court originally accepted jurisdiction of the trustee's complaint as filed,[77] The Court of Appeals for the Eighth Circuit, making an

extended review of the evolution of the Bankruptcy Act's provisions authorizing avoidance of transfers, reversed the district court's decision. Of particular pertinence to the present discussion is Judge Sanborn's statement of the [p.550] court's ratio decidendi: "Since a debtor may unintentionally and unknowingly suffer a preference, it logically follows that he may unintentionally and unknowingly suffer a fraudulent and voidable transfer of his property."[79]

p. 550]

C. The Bankruptcy Reform Act of 1978

The Bankruptcy Reform Act of 1978 eliminated the creditor's reasonable cause to believe that the debtor was insolvent as an element of a voidable preference made within ninety days of the case [p. 552] commencement,[91] and the Bankruptcy Amendments of 1984 altogether eliminated from consideration the credi-

tor's mental state in determining a voidable preference.[92] The definition of "transfer" in section 101 was shortened and simplified but continued to specify an involuntary transfer as an included mode of disposition.[93] Inasmuch as the avoidance provisions do not differentiate in any way between a voluntary transfer and a judicial lien, there is no longer a separate provision dealing with the avoidance of a judicial lien as an involuntary preference.[94]

The Bankruptcy Reform Act of 1978 retained the essential fea- [p. 553] tures of in section 548.[95] The most noteworthy departure from that Act was the replacement of fair consideration" by "reasonably equivalent value."[96] As a result, the good faith of the transferee is not an issue in determining the adequacy of the consideration exchanged for a transfer alleged to be constructively

fraudulent.[97]

III. FORECLOSURE AS A FRAUDULENT TRANSFER

A. The Durrett Decision

Although Durrett was decided in 1980, the law applied was section 67d of the Bankruptcy Act. The court followed its own construction of that section in Abramson v. Lakewood Bank & Trust Co.[98] Since Code section 548 is not significantly different from section 67d of the Bankruptcy Act, it is not surprising that many subsequent decisions have reached the same or similar results.[99] These decisions in- [p. 554] clude the ruling of the Court of Appeals for the Eighth Circuit in First Federal Savings & Loan Association v. Hulm (In re Hulm).[100]

1. Lien Enforcement as a Transfer

Disagreement with the Durrett case was not long in coming, but the dissenting

courts have adopted diverse rationales in explaining [p. 555] their rulings. The first ground of disagreement that emerged was that when a security agreement is enforced, the only operative transfer, and thus the only voidable transfer, occurs when the security interest is perfected. Where the security transfers occurs over a year before the filing of the petition by or against the debtor, the transfer is not vulnerable to avoidance under the fraudulent transfer section of the bankruptcy laws.[101] This rationale, however, took a foreshortened [p. 556] view of the relevant facts. It ignored the fact that when a security interest is enforced, a second transfer, separate from the security transfer, occurs.[102] Frequently, this transfer is to an entirely different transferee, occurs at a different time, and may be involuntary, whereas the security trans-

fer is typically voluntary, and may be for less, the same, or greater consideration than that exchanged in connection with the security transfer. The purpose of the timing provision in section 548(d)(1), like that in 547(e), is not to define a transfer or to relate its occurrence back to an earlier date. The purpose os rather to keep the voidability of a transfer from becoming barred by the running of the statute of limitations while the transfer is unperfected and therefore secret.[103] It is the second transfer that is be- [p. 557] ing challenged as fraudulent in the cases that are the concern of this Article.

* * *

[p. 559]

2. Application of Section 548 to a Transfer by a Nondebtor

A second ground of objection to the Durrett doctrine is that a fraudulent

transfer can be committed only by a debtor. Typically this objection purports to be predicated on the language of the relevant statutory provisions. Thus the dissenting judge in Abramson v. Lakewood Bank & Trust Co., quoted in the preamble to this Article, [121] and the concurring judge in Madrid v. Lawyers Title Insurance Corp. (In re Madrid),[122] disagreed with Durrett primarily by attributing to Congress an intent not to use its own definition of "transfer" in the fraudulent transfer sections of the bankruptcy laws.[123] This basis for disagreement wit Durrett contradicts compelling evidence of congressional intent.[124]

3. Transfer Pursuant to a Noncollusive, Regularly Conducted Foreclosure Sale

A third rationale, adopted in the Madrid case by the Bankruptcy Appel-

late Panel for the Ninth Circuit, is that the amount of a bid at a noncollusive, regularly conducted foreclosure sale is the reasonably equivalent value of the property sold, as determined by reference to fraudulent conveyance law.[125] This approach has the virtue of insulating from avoidance only those transfers that occur in circumstances [p. 560] affording some assurance that a fair equivalent was exchanged. The same rationale seems to have been the principal basis for the Sixth Circuit decision in In re Winshall Settlor's Trust[126] and several other courts.[127] The factual predicate for such a judicially created presumption --permitting no rebuttal--is at best debatable.[128] A more defensible approach, and one increasingly favored by the courts and commentators, recognizes that the bid obtained at a noncollusive,

regularly conducted sale may be cogent but not conclusive evidence that the transfer was made for a reasonably equivalent value.[129]

* * *

[p. 564

B. The Bankruptcy Amendments of 1984

Critics of Durrett and its progeny have lamented its adverse im- [p. 565] pact on the risks assumed by secured lenders and the costs and availability of credit.[144] No empirical evidence has yet been adduced to substantiate these claimed results.[145] Real estate lenders, who were among Durrett's critics, sought the inclusion of an amendment to the Bankruptcy Reform Act in 1984 which would overrule the decision.[146] Senator Metzenbaum insisted that the results attributed to Durrett should be inquired into at a hearing before congressional enactment of an amendment of section 548

that would excise its doctrine from the bankruptcy laws.[147] The efforts to engraft this amendment ironically succeeded only in causing the addition of language to the Code that precludes future misinterpretations ignoring the congressional purpose of subjecting involuntary as well as voluntary transfers to avoidance as fraudulent transfers.[148]

When the proponents of the amendment designed to subvert the Durrett doctrine complained to the legislators on Capital Hill thought to be friendly to the measure about the apparent backfire to their ef- [p. 566] forts, Senators Dole and DeConcini were persuaded to conduct a colloquy on the Senate floor to reassure disappointed observers that Congress had not intended to codify Durrett.[149] Quite apart from the inutility of legislative history to

undo what is written in enacted statutes,[150] it is well established that post-enactment comments by legislators, in or out of the legislative halls, do not constitute legitimate legislative history.[151] Insofar as Senator Dole stated that the 1984 amendments did not purport to deal with the question of whether a noncollusive, regularly conducted foreclosure sale should be deemed to be for a reasonably equivalent value,"[152] he was correct. Insofar as the two senators indicated that the amendment did not codify Durrett's interpretation of the scope of the definition of transfer and of the section avoiding fraudulent transfers,[153] they were wrong.[154] [p. 566]

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[p. 570]

IV. AVOIDANCE AS A DEBTOR'S REMEDY

* * *

[p. 573]

B. Redemption: Equitable and Statutory

* * *

[p. 574]

The court in Madrid v. Lawyers Title Insurance Corp. (In re Madrid) characterized the attack on the foreclosure sale made by the debtor in possession as an attempt "to create a de facto redemption right to obtain real property previously sold at foreclosure proceedings" and rejected the effort as "clearly contrary to Nevada real property law" and unsupported by the Code.[187] The court thus ignored [p. 575] the status of the debtor in possession as a fiduciary for the creditors of the estate vested with rights, powers, and duties to avoid a range of transactions and property rights perfectly valid under applicable state law.[188] The fraudulent transfer provi-

sions of bankruptcy law and state statutory redemption statutes are directed in part against the similar evil of an injurious transfer of a valuable asset of a debtor's estate. A redemption statute, however, is designed only for protecting the debtor and creditors holding property interests in the debtor's property, where a fraudulent transfer is made voidable for the benefit of unsecured creditors who have no interests in the transferred property. Moreover, the statutory right of redemption is not dependent on a showing of the debtor's insolvency, inadequacy of consideration, or intent to defeat the rights of any party to the agreement enforced by the sale or by any third party.

* * *

V. THE DIMINISHING ROLE OF SUBJECTIVE INTENT IN DETERMINING THE VOIDABILITY OF TRANSFERS

If assertions were correct that a foreclosure sale is not a transfer within the meaning of the laws governing fraudulent transfers, collu- [p. 576] sive as well as noncollusive sales would be invulnerable to attack by creditors. To the extent that the critics of the Durrett doctrine have acknowledged the case law allowing the avoidance of collusive foreclosure sales--both judicial and nonjudicial--the cases are typically explained as a recognition that a transfer may be an intentional act of the debtor although in form and pretense it appeared to be an act of the foreclosing creditor.[191] The creditor's role is simply ignored or discounted and the debtor's is given a fictitious existence that triggers the operation of the statute.[192] So long as the applicable statute requires a transfer to be made by the debtor with intent to hinder, delay, or

defraud creditors in order to be voidable, there is a literal plausibility in a construction that rejects application to an involuntary transfer with no active participation by the debtor. As this Article has shown, however, for over 400 years the courts recognized that if fraudulent transfers are to be coped with successfully by creditors, their representatives, and the courts, a transferor's acts must be judged by their effects rather than by the words of the parties that accompany them. It is difficult to take seriously an argument that a foreclosure sale which sacrifices a valuable equity of an insolvent debtor's property should be voidable by creditors when the debtor is compliant or cooperative, but that such a sale should be invulnerable to attack by creditors when the debtor either simply defaults or is resistant but unable to forestall the loss. The

injury to creditors result from a forfeiture of an asset having significant value is equally palpable and ought to be equally remediable in any rational system without regard to the debtor's mental state, whether or not that condition is accurately assessed.

Cases avoiding fraudulent transfers on the basis that the debtor intended the natural consequences of his acts[193] largely eliminate the [p. 577] transferor's mental state as an element when the trustee or creditor attacks a transfer as one made with intent to hinder, delay, or defraud. Numerous appellate rulings that accept a finding of fraudulent intent on the transferee's part as sufficient proof of the intent requisite for avoidance [194] suggest that an involuntary transfer is voidable in a proceeding based on actual as well as constructive fraud. An argument for limiting the avoidance of fraud-

ulent transfers to those intentionally contrived by the debtor disregards what courts have been doing for many years.

* * *

CONCLUSION

* * *

[p. 578]

The critics of the Durrett doctrine have not yet established their claim that its application by the bankruptcy courts has had a significantly adverse impact on the cost and accessibility of secured credit. To the extent the courts in proceedings under Code section 548 are willing to give significant weight to the circumstances that afford a safe harbor to the transferee under UFTA, application of the two statutes will reach similar results. In the meantime, the vulnerability of an involuntary transfer to avoidance as a constructive fraud should encourage a lienor or lessor to exercise

care to maximize the consideration passing or to minimize the loss resulting to the debtor incident to the enforcement of rights on default.[196] The plethora of successful [p. 579] attacks on involuntary transfers as constructive frauds has focused needed attention on the unsatisfactory state of procedures for lien en- [p. 580] forcement and lease termination.[197] If the critics and supporters of Durrett can join in efforts directed toward improvement of these procedures, the final outcome of the preoccupation with the Durrett doctrine will surely be a serendipitous benefit to debtors and creditors, both secured and unsecured.

* * *

D114:BFPSC.P98

FILED
JUL 9 1993
OFFICE OF THE CLERK

No. 92-1370

In the Supreme Court of the United States

OCTOBER TERM, 1992

In re: **BFP**, A Partnership, Debtor

BFP, A Partnership,
Petitioner,
v.

IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ, JOSE CRUZ; RICHARD MARCZ,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Frank Allen, Levander and Elnora McKeever, the Consumer Education and Protective Association, the Consumers League of New Jersey, and Chapter 13 Trustee Edward Sparkman as Amici Curiae in Support of Petitioner

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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Francis Allen is a New Hampshire resident who has filed bankruptcy pursuant to chapter 13 of the Bankruptcy Code. Mr. Allen's wife and six children live in a home which he purchased in 1980 and which has a value of $60,000.00. In 1989 Mr. Allen fell behind on his property taxes. Through 1992 his property tax arrears totalled approximately $5,700.00. In June of 1992, Mr. Allen lost title to his home to a tax foreclosure for a total price of $400.16, representing unpaid 1989 property tax. The tax foreclosure process thus recovered less than 1 percent of the value of the property.

Since filing bankruptcy in early 1993, Mr. Allen and the chapter 13 standing trustee for the District of New Hampshire have sought to set aside the tax foreclosure as a fraudulent transfer pursuant to 11 U.S.C. § 548. The case remains pending. If successful, some or all of the equity in the recovered property would be exempt. Mr. Allen has

proposed and would implement a bankruptcy plan to pay off his tax arrears with interest over time so that he and his family could keep the house by reorganizing under chapter 13. The outcome of Mr. Allen's case depends on the issues to be decided in the appeal before this court.

Levander and Elnora McKeever are residents of Chicago, Illinois. They purchased a single family home in Chicago in 1972. In 1986, a "tax purchaser", JoAnn McClandon, paid the unpaid taxes on their home, thereby acquiring a lien on their property. The McKeevers were unable to redeem their home from this lien. In 1988, McClandon obtained a tax deed to their home and in 1989 the McKeevers were evicted. At the time the tax deed was granted, the McKeevers' home was worth $53,000.00 and they had $32,000.00 of equity in their home.

McClandon paid a total of $4,645.11 in unpaid taxes and costs to obtain the property. The McKeevers lost the equity in their home for less than 15% of its value. Under

Illinois law, McClandon did not have to satisfy the mortgage the McKeevers had on their home before obtaining the tax deed. Thus, McClandon acquired a property worth $53,000.00 for less than 9% of its value.

In 1989, the McKeevers filed chapter 7 Bankruptcy. In 1990 they brought an adversary proceeding against the tax purchaser based upon 11 U.S.C. §§ 548(a)(2) and 11 U.S.C. 544(b), pursuant to 11 U.S.C. § 522(h). On October 29, 1991 the Bankruptcy Court denied the tax purchaser's motion to dismiss. In re McKeever, 132 B.R. 996 (Bankr. N.D. Ill. 1991). The adversary proceeding is scheduled for trial on July 19, 1993.

Amicus Consumer Education and Protective Association, Inc. ("CEPA") is a membership organization of primarily low-income consumers based in Pennsylvania. CEPA is dedicated to advancing the cause of consumer rights, and in particular, the support and protections of the policies and remedies found in the Bankruptcy Code that

enable distressed homeowners the opportunity to save their homes from foreclosure through a chapter 13 plan. Another of the protections of the Code which CEPA is dedicated to advancing is the debtor's right to obtain a fresh start after recovering property, most frequently a home in which they have an equity interest, pursuant to 11 U.S.C. § 548(a)(2).

The Consumers League of New Jersey ("Consumers"), founded in 1900, is a membership organization advocating the rights of consumers and homeowners. Consumers League believes that one of the strengths of the United States is the percentage of citizens who own their own homes, that keeping this percentage high is an important national goal, and hence that homeowners should be given every opportunity to save homes from foreclosure through the use of federal bankruptcy rights, including chapter 13 repayment plans. Co-Counsel for Consumers League and CLNJ Board member is Professor Philip Shuchman of Rutgers University School of Law School. Professor Shuchman was Deputy

Director of the Commission on the Bankruptcy Laws of the United States. Professor Shuchman has also published a statistical study which bears directly on the issue before this Court: Data on the Durrett Controversy, 9 Cardozo L. Rev. 605 (1987). There Professor Shuchman showed that in jurisdictions where court decisions followed the plain language of 11 U.S.C. § 548 (allowing recovery of property sold for less than "reasonably equivalent value") mortgage lending was just as robust as in those jurisdictions which nullified the language of § 548.

Amicus Edward Sparkman is the Chapter 13 Standing Trustee for the bankruptcy court for the Eastern District of Pennsylvania. He has the statutory duty to review and administer chapter 13 plans and represent the interest of the bankruptcy estate. A decision that a regularly conducted, non-collusive foreclosure sale demonstrates per se that a transfer was for reasonably equivalent value would undermine the Trustee's ability to recover property for the

benefit of the estate. This would run counter to the Bankruptcy Code's policy of fair and equitable distribution of the debtor's estate to all creditors, most particularly unsecured creditors who would benefit from the equity that would otherwise be unavailable to the estate. Further, Amicus believes that affirming the standard for determining reasonably equivalent value pursuant to 11 U.S.C. § 548(a)(2) as the Ninth Circuit held would undermine the delicate balance of debtor and creditor rights that exists in chapter 13 of the Bankruptcy Code.

SUMMARY OF THE ARGUMENT

Section 548(a)(2) of the Bankruptcy Code provides that the Trustee may avoid any transfer of an insolvent debtor's interest in property made within one year of the bankruptcy's filing where such transfer was constructively fraudulent. A constructively fraudulent transfer is defined as one in which the consideration given to the debtor is less than the reasonably equivalent value of the property. 11 U.S.C. § 548(a)(2). There is no exception stating that foreclosure sales are exempt from the avoidance powers of the Trustee pursuant to § 548(a)(2), nor did Congress intend that foreclosure sales be treated differently from other types of transfers. Nevertheless, in this case, the Ninth Circuit Court of Appeals created such an exception by judicial fiat, inserting into the language of § 548 the irrebuttable presumption that foreclosure sales are not avoidable regardless of the value received by the debtor, as long as they are "regularly conducted" and "non-collusive". BFP v.

Imperial Sav. & Loan Ass'n, (In Re BFP), 974 F.2d 1144, 1148 (9th Cir. 1992), cert. granted, 61 U.S.L.W. 3787 (1992). The Ninth Circuit's decision effectively eliminates the Trustee's power - explicitly provided for in § 548 of the Bankruptcy Code - to avoid foreclosure sales. That holding conflicts with the decisions of the Courts of Appeals for the Third, Fifth, Seventh, Eighth, and Eleventh Circuits.

There is no basis in the language or policy of the Bankruptcy Code, its legislative history, nor the policies underlying mortgage foreclosure and/or fraudulent conveyance law to support this judicial exception created by the Ninth Circuit. The decision completely undermines the essential policies underlying the Bankruptcy Code and § 548, which seek to grant the debtor a fresh start, to give effect to the Trustee's powers to avoid, and to provide for the equitable distribution of the debtor's estate to all creditors. Therefore, Amici support the Petitioner's contention that the Ninth Circuit decision must be reversed and that this Court

should adopt a test for "reasonably equivalent value" that is based on the loss of value experienced by the estate as a result of the transfer. Such a test has already been articulated by the Fifth Circuit in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980).

ARGUMENT

I. CONGRESS HAS MADE CLEAR THAT A FORECLOSURE SALE IS A TRANSFER WITHIN THE MEANING OF SECTION 548

Section 548(a)(2) of the Bankruptcy Code clearly mandates that all transfers that are constructively fraudulent are voidable transfers in bankruptcy cases.[1] In response to several controversial circuit court decisions, Congress made

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[1] § 548(a)(2) provides that:

(a) The trustee may avoid any transfer of an interest of the debtor in property . . . that was made . . . on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(2)(A) received less than reasonably equivalent value in exchange for such transfer . . . and,

(B)(i) was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer.

clear that foreclosure sales are subject to avoidance by the Trustee pursuant to § 548(a)(2). In 1980, the Fifth Circuit held that a lien enforcement of a debtor's interest in property, including a foreclosure sale or sheriff's sale, was a "transfer" within the meaning of § 548(a)(2). Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981), cert. denied, 454 U.S. 1164 (1982). The Ninth Circuit originally took the opposite position, holding that a "transfer" within the meaning of § 548 occurs only at the time that a security interest is perfected, not at the time of foreclosure sale. In re Madrid, 725 F.2d 1197, 1200-01 (9th Cir.), cert. denied, 469 U.S. 833 (1984).[2] A concurring opinion in Madrid disagreed with the majority's position that there can

[2] In In re Winshall Settlor's Trust, 758 F.2d 1136, 1138-40 (6th Cir. 1985), the Sixth Circuit followed the Ninth Circuit, holding that a foreclosure was not a transfer. This decision was a pre-Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAJFA") case. BAJFA is only effective for cases filed on or after October 8, 1984. Thus, courts continue to apply pre-BAJFA law in cases filed before that date.

only be one transfer at the time of perfection, but argued that a foreclosure sale still did not constitute a "transfer" under § 548 because it was not a voluntary transaction by the debtor. Id. at 1203-04.

In 1984, with the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAJFA"), Congress resolved this controversy, making clear its intention that foreclosure sales are among the types of transfers that can be avoided under § 548(a)(2). BAJFA amended the Bankruptcy Code's definition of "transfer" in § 101(54)[3] to include "foreclosure of the debtor's equity of redemption," 11 U.S.C. § 101(54), thereby adopting the Durrett analysis of "transfer" and overruling that of the Ninth Circuit in

[3] Prior to the 1984 amendment the definition of "transfer" was at 11 U.S.C. § 101(48). It did not specifically enumerate foreclosure of the debtor's equity in property. Between 1984 and 1990, the definition of "transfer" was at § 101(50) and did include foreclosure of the debtor's equity or redemption. The 1990 amendment did not alter the definition of transfer but changed its codification to § 101(54).

Madrid.[4] BAJFA also amended § 548(a) to explicitly provide that it is applicable to both voluntary and involuntary transfers of property, thereby overruling the concurring opinion in Madrid which would have held that § 548 does not apply to involuntary transfers. Therefore, with BAJFA, Congress overruled Madrid and its progeny. In fact, Congress specifically rejected an attempt to exempt regularly conducted, non-collusive foreclosure sales from the definition of "transfer" and thereby from § 548(a)(2). Compare S.445, 98th Cong., 1st Sess. § 360 (193) with S.445, 98th Cong., 1st Sess. § 360 at 104 (1986).

Since the 1984 BAJFA amendments to the Code, there has been no dispute that foreclosure sales in which the debtor receives less than reasonably equivalent value are avoidable under § 548. Controversy continues, however, as

[4] The Ninth Circuit explicitly acknowledged as much in In re Ehring, 900 F.2d 184, 187 (9th Cir. 1990), stating that BAJFA makes clear that foreclosures are transfers.

to the appropriate standard to use in measuring "reasonably equivalent value" in the foreclosure sale context.

II. THERE IS NO STATUTORY BASIS FOR THE NINTH CIRCUIT'S DISTINCTION BETWEEN FORECLOSURES AND OTHER TRANSFERS FOR THE PURPOSE OF ESTABLISHING REASONABLY EQUIVALENT VALUE UNDER SECTION 548(a)(2)

Three separate tests for determining "reasonably equivalent value" have emerged among the Courts of Appeal. First, under the Fifth Circuit's opinion in Durrett, 621 F.2d at 203, transfers arising from a non-collusive foreclosure sale which receive less than a substantial percentage[5] of the fair

[5] The Durrett court stated that the foreclosure sale deprived the bankruptcy estate of an equity in the property of $84,600.00 (57.7% of the market value) and that the court was unable to locate a court decision where a transfer had been approved for less than 70% of the market value. The Fifth Circuit's reference to 70% has led other courts and commentators to read that opinion as establishing a fixed percentage mark or bright-line rule - the so-called "Durrett 70% rule." As the Seventh Circuit noted in In re Bundles, 856 F.2d 815, 820 (7th Cir. 1988), this is incorrect. The Fifth Circuit actually simply analyzed the question of reasonably equivalent value in terms of whether the foreclosure sale price is some acceptable percentage of the market value of the property. See Durrett at 621 F.2d 203-204. Subsequently in Walker v.

market value of the property are held to be for less than reasonably equivalent value and can accordingly be set aside under § 548(a)(2). That test is based primarily on a comparison of the fair market value of the property with the price obtained at the sale and precludes extraneous considerations like the foreclosure procedures. (The "Durrett-like", or "comparison of foreclosure price to value" test.)[6]

Littleton (In Re Littleton), 888 F.2d 90, 93 (11th Cir. 1989), the Eleventh Circuit warned against talismanic adherence to the 70% figure, stating that it was not a completely rigid percentage and holding that in the facts of that case the bankrupt estate was deprived of little or no equity due to the existence of junior liens on the property. See also In re Grissom, 955 F.2d 1440, 1446 (11th Cir. 1992) (Durrett's test "should only be used as a guideline", but if foreclosure sale achieves less than 70% of the market value, that is a factor in rebutting any presumption of reasonableness of the sale).

[6] Durrett was actually decided under § 67(d) of the former Bankruptcy Act, which was the precursor to § 548(a)(2) of the Bankruptcy Code. The Bankruptcy Reform Act of 1978 replaced "fair consideration" by "reasonably equivalent value". See, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Section 548, 92 Stat. 2549. Although Durrett was decided in 1980, the law applied was § 67(d) of the Bankruptcy Act. The new Bankruptcy Code did not change the pre-existing law regarding the avoidance of transfers. Thus, Durrett and its progeny are not based on a change in law. That is not an issue in this case. A similar approach to that of Durrett was adopted by the Eighth Circuit in

Second, under the Ninth Circuit's Bankruptcy Appellate Panel opinion in Madrid, 21 B.R. 424 (Bankr. 9th Cir. 1982) and in the Ninth Circuit's opinion in BFP, 974 F.2d at 1148, property obtained at a regularly conducted, non-collusive foreclosure sale was found to satisfy the reasonably equivalent value test as a matter of law. (The "BFP" test.)[7] Finally, the Seventh Circuit in Bundles v. Baker (In re Bundles), 856 F.2d 815, 823-24 (7th Cir. 1988) opted for a standard that looks to the "totality of the circumstances" of the foreclosure sale, with the starting point for the court's

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First Fed. Sav. & Loan Ass'n v. Hulm (In re Hulm), 738 F.2d 323 (8th Cir.) cert. denied, 469 U.S. 990 (1984) which rejected the Ninth Circuit's view that the foreclosure sale price itself per se constitutes, "reasonably equivalent value" and remanded for an evidentiary hearing to determine the value of the transfer. See also General Indus., Inc. v. Shea (In re General Indus. Inc.), 79 B.R. 124 (Bankr. D. Mass. 1987).

[7] Only the Sixth Circuit has followed the decision of the Madrid Bankruptcy Appellate Panel which BFP also followed in the Ninth Circuit. See In re Winshall Settlor's Trust, 758 F.2d 1136, 1138-40 (6th Cir. 1985).

review being the fair market value of the property.[8] (The "Bundles" test). Bundles effectively establishes a rebuttable presumption that the price received at a regularly conducted foreclosure sale represents reasonably equivalent value. Id. at 824. In determining whether this presumption has been successfully rebutted the court looks to such factors as whether a fair appraisal of the property was provided, the extent to which the sale was advertised, and the sufficiency of competitive bidding, if any, during the sale. Id. at 824-825. Thus, to illustrate the three approaches, a non-collusive, regularly conducted foreclosure sale yielding 40% of the property's fair market value, would be avoided under Durrett, upheld under BFP, and only avoided under Bundles if the trustee could, based on the totality of the circumstances, rebut the presumption that the foreclosure sale price represented reasonably equivalent value.

The BFP and Bundles tests are inherently flawed in that they ignore the plain language of § 548(a)(2) and grant undue deference to state law concerning foreclosure sale procedures. Section 548(a)(2) does not state that a foreclosure sale price presumptively constitutes "reasonably equivalent value," nor does it state that the bid price obtained at a foreclosure sale that complied with state procedures is reasonably equivalent value. The statute makes no distinction between foreclosure sales and other types of transfers, nor does it distinguish between sales that do or do not comply with state laws governing foreclosure procedures.

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[8] See also Barrett v. Commonwealth Fed. Sav. & Loan Ass'n (In re Barrett), 939 F.2d 20 (3d Cir.1991) (rejecting Madrid rule that foreclosure sale price contitutes reasonably equivalent value and adopting Bundles-type totality of the circumstances test); (In Re Morris Communications NC, Inc., 914 F.2d 458 (4th Cir. 1990) (same); In re Grissom, 955 F.2d 1440, 1446 (11th Cir. 1992); (same) In re General Indus., 79 B.R. 124, 132 (Bankr. D.Mass. 1985) ("Reasonably equivalent value implies a rule of reasonableness in light of the particular circumstances."); In re Pruitt, 72 B.R. 436, 445-446 (Bankr. E.D.N.Y. 1987) ("This court is convinced that the case by case approach is the appropriate way of ascertaining whether a foreclosure sale is the reasonably equivalent value of the property for purposes of § 548(a)(2)"; In re National Envtl. Sys. Co., 111 B.R. 4, 9 (Bankr. D.N.H. 1989) ("This court adopts the Bundles flexibility rule in the absence of any other guidance by binding precedent in this circuit").

The judicially imported irrebuttable presumption of BFP and the extraneous foreclosure procedure factors considered highly relevant in Bundles are examples of judicial legislation upon which this Court should not affix its imprimatur. This Court should adopt a Durrett-like test which articulates a reasoned, clear, federal standard for determining value. Such a value-oriented standard recognizes that the only factors made relevant by the statute itself are the price obtained at the transfer and the measure of its equivalence to the actual value of the property.

As in all cases, the starting point in this case must be the statutory language itself. See Toibb v. Radloff, 111 S. Ct. 2197, 2200 (1991); Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 556 (1990); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989). And where, as here, the plain language is susceptible to a rational interpretation consistent with the purposes underlying the Bankrupcty Code, it should also be the ending point. The

words "reasonably", "equivalent," and "value"[9] are words of common meaning. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979); accord, Mills Music, Inc. v. Snyder 469 U.S. 153, 164 (1985); Escondido Mut. Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765, 772 (1984). As "reasonably equivalent value" has not been otherwise defined in the Bankruptcy Code, this Court must look to the ordinary common meaning of the words. The common meaning of "reasonable" is "[f]air, proper, just, moderate ... rational, equitable, fair, suitable, moderate, tolerable."[10] Black's Law

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[9] Section § 548(d)(2)(A) defines value as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor," which definition aids little in interpreting "reasonably equivalent value". See In Re Bundles, 856 F. 2d 815, 824 (7th Cir. 1988).

[10] It is also defined as "moderate, ... that allows a fair profit". Webster's Third New International Dictionary, 1892 (1966).

Dictionary 1265 (6th ed. 1990). The common meaning of "equivalent" is "[e]qual in value, force, measure ... having equal or corresponding import ... alike, identical."[11] Id. at 541. The common meaning of "value" is "[t]he estimated or appraised worth of any object or property, calculated in money . . . saleable value, actual value, market value, fair value, reasonable value, and cash value may all mean the same thing."[12] Id. at 1551.

Thus, the common meaning of reasonably equivalent value results in a standard that mandates that foreclosure sales, like any other transfers, must be avoided unless the consideration given by the purchaser is fairly (or moderately) equal (or alike) to the value of the property in reasonable,

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[11] It is also defined as "[e]qual in ... amount, ... [or] value ... corresponding or virtually identical". Websters supra note 10, at 769.

[12] It is also defined as "[t]he amount of a commodity ... that is the equivalent of something else; a fair return in goods, services, or money." Websters supra note 10, at 2530.

fair, saleable, or cash value. While it is true that Congress did not use the term "fair market value"[13] in lieu of "reasonably equivalent value" in § 548(a)(2), neither did Congress state that "reasonably equivalent value" means whatever price is obtained at a regularly conducted, non-collusive foreclosure sale. A Durrett-like rule where the foreclosure price is compared to the fair market value and where 70% is a benchmark for reasonable equivalence gives credence to the common meaning of the statutory language.[14] This rule also takes into account the fact that

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[13] Black's Law Dictionary defines "market value" as "[f]air value of property as between one who wants to purchase it and another who desires to sell it. What willing purchaser will give for property under fair market conditions. Not what the owner could realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property." Black's Law Dictionary, 1552 (6th ed. 1990) (citations omitted).

[14] It also has the benefit of encouraging potential purchasers at foreclosure sales to bid higher prices to ensure that the sale is not subsequently set aside pursuant to § 548. See, Philip Shuchman, Data on Durrett Controversy, 9 Cardozo L. Rev. 605, 619 n.58 (1987); John Mixon, Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism that Increases

a foreclosure sale may have occurred and that an optimum price was not obtained. That is why Congress used the word "reasonably". The courts that use a Durrett-like test are saying that they will not avoid a transfer by foreclosure that is for 80% or 90% of the value of the property. But a foreclosure price that is 65% or 70% of value may not, under the facts of the case, be reasonable. For example, Amicus Frank Allen's home was sold at tax foreclosure for a mere 1% of the appraised value of the property, and Amici Levander and Elnora McKeever's home was sold at tax foreclosure for only 9% of its value. Amici are hard put to comprehend how these foreclosure prices could ever be held to be "reasonably equivalent" to the value of their homes.

The real issue for purposes of § 548(a)(2) is whether or not the debtor's estate has suffered a significant loss, because the purpose of § 548 is to recover for the estate

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Personal Tragedy, Impedes Regional Economic Recovery, and Means Little to Lenders, 22 Texas Tech. L. Rev. 1, 31 (1991).

assets that could be distributed to unsecured creditors (or to equity security holders, or to the debtor as exempt property). See In re Lindsay, 98 B.R. 983, 989 (Bankr. S.D. Cal. 1989) (debtor's other creditors are deprived of recourse to an asset of the estate by an improvident sale) In re New Yorketown Assocs., 40 B.R. 701, 705 (Bankr. E.D. Pa. 1984) (Section 548(a)(2) designed to rectify prepetition depletion of debtor's estate). Hence, § 548(a)(2) plainly states that any transfers of property where the debtor receives an amount that is of less than reasonably equal value for the property must be avoided. There is no exemption or special test for foreclosure sales. Congress intended that a debtor's unsecured creditors not be deprived of their rightful share in the distribution of the debtor's estate by a transfer that is for insufficient value. Thus, the value received by the debtor in relation to the value of the property transferred is the relevant question of fact. See First Fed. Sav. & Loan Ass'n v. Hulm

(In re Hulm), 738 F.2d 323, 327 (8th Cir.), cert. denied, 469 U.S. 990 (1984).

And, it should also be noted that Congress carefully protected the interests of a third party good faith purchaser at foreclosure sales when that transfer is avoided by providing that the purchaser retains a lien on the property as security for the purchase price paid. 11 U.S.C. §§ 548(c), 550(d). See Durrett, 621 F.2d at 204. Hence, adopting a Durrett-like standard would not harm third party good faith purchasers.

Outside of the context of foreclosure sales, it has long been established that § 548(a)(2) mandates a comparison of the value received by the debtor in a transfer with the fair market value of the transferred property. See, e.g., Gray v. Snyder, 704 F.2d 709, 713 (4th Cir. 1983) (conveyance of property in exchange for release of marital property rights remanded to determine whether release of support rights constituted reasonably equivalent value); In re Ozark

Restaurant Equip. Co., 850 F.2d 342, 345 (8th Cir. 1988) (determining whether or not debtor received "fair exchange" in marketplace for sale of debtor's equipment); In re McConnell, 934 F.2d 662, 665 (5th Cir. 1991) ($600,000 down payment on purchase option agreement void where "fair market value" of option property in declining market was $320,000 and selling price was $819,000); In re Jeffrey Bigelow Design Group, Inc., 956 F.2d 479, 485 (4th Cir. 1992) (determining whether or not estate received "approximate value" of debtor's payments on a line of credit).

In Covey v. Commercial Nat'l Bank, 960 F.2d 657, 662 (7th Cir. 1992), for example, the sale of the debtor's assets was avoided because the debtor did not receive reasonably equivalent value given the "true or market value" even though debtor received a reasonably equivalent value given the amount of his remaining indebtedness. Because courts analyzing reasonably equivalent value outside of the

foreclosure sale context recognize the depressive effect of valuations based on a comparison of the receipt from the sale and the amount of the indebtedness, reasonably equivalent value is not determined by comparing what the creditor received from a forced sale with the amount of the indebtedness. See Id. at 661-662 (criticizing practice of allowing creditor who seizes asset and sells it for amount that merely covers amount of indebtedness; such a sale yields reasonably equivalent value only as to the amount of the indebtedness but not as to transferred property's "true value"). Cf. In re Abbott's Dairies, 788 F.2d 143, 149 (3rd Cir. 1986) (rejecting assumption that auctioning off assets establishes that purchasers paid value for transferred property). Reasonably equivalent value is therefore determined by comparing the fair market value of the transferred property with the consideration the debtor received in exchange for that property. See Gray, 704 F.2d at 713; Mellon Bank v. Metro Communications, Inc., 945

F.2d 635, 647 (3d Cir. 1991); In re Jeffrey Bigelow, 956 F.2d at 479; Covey, 960 F.2d at 662.[15]

Thus, the plain language of § 548(a)(2) mandates that this Court reverse the decision of the Ninth Circuit Court of Appeals.

III. THE LEGISLATIVE HISTORY ALSO SUPPORTS PETITIONER'S "REASONABLY EQUIVALENT VALUE" TEST

To the extent that the language of § 548(a)(2) is deemed to be subject to alternative interpretations, one must look to the statutory scheme as a whole and its legislative history in order to determine the meaning Congress intended when it chose particular language. As this Court observed in United Sav. Ass'n v. Timbers of Inwood Forest Assoc.

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[15] In determining reasonably equivalent value courts examine several factors that affect the value of the transferred property. In re Abbotts Dairies, 788 F.2d at 149 (appraisal value); In re Ozark Restaurant Equip., 850 F.2d at 345 (market conditions faced by willing seller and willing buyer); In re McConnell, 934 F.2d at 655 (property value at time of sale and market conditions); Mellon Bank v. Metro Communications, 945 F.2d 648 (expert testimony re: value of consideration received compared with value given).

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

484 U.S. 365, 371 (1988) (citations omitted).

One of the basic purposes and policies of the Bankruptcy Code is to ensure the equitable distribution of the debtor's entire estate to all creditors through, inter alia, the Trustee's power to avoid preferences and fraudulent transfers made intentionally, see § 548(a)(1), or constructively, see § 548(a)(2). Another basic policy and purpose of the Bankruptcy Code is to give the debtor a fresh start.[16] As this Court has stated:

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[16] See, e.g., H.R. Rep. No. 595, 95th Cong., 1st Sess. 117 (1977) (fresh start is "the essence of modern bankruptcy law"). See also id. at 118 (Ch. 13 is designed to ensure "the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start).

> This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

Grogan v. Garner, 111 S. Ct. 654, 659 (1991), quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Thus, the only reasonably equivalent value test that is truly consistent with these two goals of ensuring equitable distribution of the debtor's entire estate - including his equity in his home - to all creditors and ensuring the debtor a fresh start by not depriving him of his exempt equity exemption, is a Durrett-like rule that recognizes the primacy of the percentage value lost to the estate by the transfer. This Court should hold that the appropriate standard is a comparison of the foreclosure price achieved in relation to the fair or reasonable value of the property to determine what the debtor received in return for what he surrendered. See In re Brasby, 109 B.R. 113,

124-125 (Bankr. E.D. Pa. 1990);[17] Ananko v. Harsanyi, 91 B.R. 231 (D.N.J. 1988); See also Richardson v. Gillman (In re Richardson), 23 B.R. 434, 447 (Bankr. D. Utah 1982); Martin v. Phillips (In re Butcher), 58 B.R. 128, 130 (Bankr. E.D. Tenn. 1986); Meister v. Jamison (In re Jamison), 21 B.R. 380, 382 (Bankr. D. Conn. 1982).

Further, the significance of the absence of any reference to regularly conducted, non-collusive foreclosure sales as an exception to the reasonably equivalent value test is buttressed by the fact that in 1984, Congress, when considering amendments to the Code, expressly rejected an amendment that would exclude regularly conducted, non-collusive foreclosure sales from the avoidable transfer provisions of the Code. Congress thereby refused to overrule Durrett. Thus, the ultimate intent of Congress coincides with

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[17] In Brasby, the Bankruptcy Court recognized the difficulties inherent in the valuation process but noted that "[v]aluation of [non-commercial real estate] is not that difficult (utilizing the comparative market approach)." 109 B.R. at 124-125.

the foregoing statutory construction. Cf. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985).

Despite this, a number of critics point to a colloquy of Senators Dole and DeConcini on the Senate floor in an attempt to assert that Congress did not codify the Durrett case. See Bundles, 856 F.2d at 821 (parties cite to colloquy which court rejects as legislative history stating "Congress did not legislate an irrebuttable presumption in the case of mortgage foreclosure sales"). See also Verna, 58 B.R. at 251 ("court declines to adopt some kind of reverse parol evidence rule, where oral statements are elevated above enacted language in determining the meaning of the statute"). These critics fail to point out, however, that the colloquy is of no value as legislative history because it took place after Congress passed the amendments to the Code.

Professor Kennedy notes[18] this effort at creating post facto legislative history in an attempt to undermine Congress' firm rejectance of the regularly conducted non-collusive foreclosure sale exemption and asserts that:

> Quite apart from the inutility of legislative history to undo what is written in enacted statutes, Cf. Verna v. Dorman (In re Verna), 58 Bankr 246, 251 n.7 (Bankr. C.D. Cal. 1986) (declining "to adopt some kind of reverse parol evidence rule, where oral statements are elevated above inacted language in determining the meaning of the statute") (further citations omitted), it is well established that post-enactment comments by legislators, in or out of legislative halls, do not constitute legitimate legislative history. See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 639 n. 34 (1967) (further citations omitted).

Kennedy, Involuntary Fraudulent Transfers, 9 Cardozo L. Rev. 531, 566 (1987).

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[18] Professor Kennedy states, "[t]he efforts to engraft the amendment ironically succeeded only in causing the addition of language to the Code that precludes future misinterpretations ignoring the Congressional purpose of [making foreclosure sales subject] to avoidance as fraudulent transfers." See Kennedy, Involuntary Fraudulent Transfers, 9 Cardozo L. Rev. 531, 565 (1987).

The Bankruptcy Court in Verna, further notes that when this result of the 1984 amendments was called to its attention, "Congress did intentionally leave this result undisturbed," 58 B.R. at 251, despite the Dole/DeConcini colloquy, and refused to reinstate the Ninth Circuit Bankruptcy Appellate Panel's Madrid decision (holding, like BFP, that a regularly conducted, non-collusive foreclosure sale establishes the reasonable equivalent value of the property). Hence, the plain meaning of the "less than reasonably equivalent value" standard, the legislative history of the BAJFA amendments, and the statutory scheme as a whole lead to the inevitable conclusion that the BFP holding of the Ninth Circuit below must be rejected by this Court.

IV. RESPONDENTS' HEAVY RELIANCE ON POLICY CONCERNS SUPPOSEDLY FAVORING AN INVIOLABLE FORECLOSURE PROCESS IS MISPLACED: SUCH POLICY CONCERNS ARE NOT ONLY IRRELEVANT IN LIGHT OF THE PLAIN LANGUAGE OF THE STATUTE, THEY ARE ALSO NEBULOUS AND UNSUPPORTED BY EMPIRICAL EVIDENCE.

The Courts of Appeals which rejected the Durrett doctrine and followed either the Madrid/BFP or the Bundles approach, (focusing on whether a foreclosure sale was regularly conducted and non-collusive) based their determinations on policy concerns. However, it is beyond the courts' scope of review to consider any policy implications to decide this case. Such considerations can only be addressed by Congress. First Fed. Sav. & Loan Ass'n v. Hulm (In re Hulm), 738 F.2d 323, 327 (8th Cir.), cert. denied, 469 U.S. 990 (1984), accord, Bundles, 856 F.2d at 823.

Amici submit that, given the clear statutory language of Section 548(a)(2) wherein Congress has established a

federal standard permitting avoidance of transfers for less than reasonably equivalent value, it is beyond the judiciary's power to substitute state law policy considerations, or, social and economic policy concerns for those of Congress as articulated in the Code. See Hulm, 738 F.2d at 327; Bundles, 856 F.2d 815. See also Shuchman, Data on the Durrett Controversy, 9 Cardozo L. Rev. 605 (1987).

A. This Is Not An Issue Where State Law Property Interests Are Considered Paramount By Congress.

The Ninth Circuit in Madrid postulated that any reading of § 548(a)(2) that holds foreclosure sales to be avoidable transfers, or, that holds a standard for determining "reasonably equivalent value", which does not exempt foreclosure sales and that therefore permits bankruptcy courts to set aside such sales, would destabilize the mortgage market. The court stated that "[c]reating a federal de facto right of redemption under the bankruptcy laws is clearly

contrary to Nevada real property law." Madrid, 725 F.2d at 1202 (citations omitted). The court posited that such a federal right of redemption would chill participation at foreclosure sales and have negative repercussions in the lending arena. Id. Madrid and its progeny including BFP characterize the issue as being one of defining the proper relationship between federal bankruptcy law and non-bankruptcy state law, rather than focusing, as they should, on statutory construction. The Madrid court cited this Court's decision in Butner v. United States, 440 U.S. 48, 54 (1979) for the proposition that courts should not use § 548 or any provision of the Bankruptcy Code to alter existing property interests under state law absent an overruling federal interest. See Bundles, 856 F.2d at 819. Butner, however, is clearly inapposite because:

> [I]n Butner, the issue was whether the right to rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgage property should be determined by a federal rule of equity or by

> state law. The Court held that, where Congress has not exercised its power to establish bankruptcies, state law should be applied. ... Here, Congress has not left the determination of property rights to state law. Rather, Congress has enacted a federal rule defining when a foreclosure sale may be set aside in bankruptcy.

Bundles, 856 F.2d at 822. The Seventh Circuit then noted that this Court in Butner expressly recognized that Congress in enacting § 548 clearly delineated a federal property rule for bankruptcy.

> The constitutional authority of Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States" would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule. The Bankruptcy Act does include provisions invalidating certain security interests as fraudulent, or as improper preferences over general creditors. Apart from these provisions, however, Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.

Butner, 440 U.S. at 54 (footnotes omitted) (emphasis supplied in Butner). In an accompanying footnote, the Court listed 11 U.S.C. § 107(d) of the old Bankruptcy Act (presently codified at § 548(a) of the Code) as an example of a provision in which Congress has established a federal property rule for bankruptcy. Id. at 54 n.8, 99 S. Ct. at 917.

As the Bankruptcy Court in Richardson stated:

> [s]tate law's sanction of exchanges in foreclosureswhich are not reasonably equivalent gives effect to state contract and foreclosure policy but may overlook the interests of other creditors of the debtor.The determination of reasonable equivalence should not be controlled by state law. Rather, reasonable equivalence should be determined in light of the function of Section 548 in fostering an equitable distribution of the debtor's property.

In re Richardson, 23 B.R. 434, 447 (Bankr. D. Utah. 1982).

Thus, this Court must reject the view of the Circuit Courts that state foreclosure law should determine the standard of reasonably equivalent value where Congress clearly set forth a federal standard which does not, by its

plain language, grant an irrebuttable or a rebuttable presumption that a state foreclosure sale price determines the avoidability of that transfer.

B. Respondents' Economic And Social Policy Concerns Are Not Supported By Logic Or Empirical Evidence.

Putting aside the fact that it is not the province of the judiciary but that of Congress to consider the economic and societal policy implications of bankruptcy courts setting aside foreclosure sales as constructively fraudulent transfers, see Bundles, 856 F.2d at 823, the concern that permitting avoidances of these transfers would destabilize mortgage markets is chimerical. Nevertheless, the BFP court posits that failing to make foreclosure bids sacrosanct on the issue of reasonably equivalent value will result in depressed foreclosure sale prices and higher costs in the mortgage markets.

These rationales underlying the BFP, Bundles and Barrett decisions are fatally and inherently flawed. They are

flawed because: first they erroneously assume that state foreclosure procedures are designed to obtain high prices; and second, they erroneously postulate that permitting the avoidance of foreclosure sales will chill real estate foreclosures and further depress prices obtained at such sales. Empirical studies, however, demonstrate that setting aside foreclosure sales will not result in higher mortgage loan costs or in destabilized mortgage markets and in fact, show that it is equally as likely that it results in lower loan costs and promotes economic efficiency in the market. Adopting a reasonably equivalent value test that compares the foreclosure sale price with the property's market value will serve the Bankruptcy Code policies of equitable distribution among creditors of the debtor's assets, and, granting the debtor a fresh start.

1. Existing State Foreclosure Procedures Do Not Contain Protections Which Would Ensure That The Debtor's Bankruptcy Estate Will Obtain Value For Foreclosed Property.

Historically, the law of mortgage foreclosure has veered between protecting the rights of mortgagees and protecting the rights of mortgagors depending upon whose interests were seen by the legislators and courts to be more pressing. See Weschler, Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure - An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. Rev. 850 (1985). In the American colonies foreclosures without sales, known as strict foreclosures, were quickly recognized as being unduly harsh on mortgagors with the eventual result that foreclosure sales, judicial or non-judicial, became the established, primary method of foreclosure by the early 1800's. Id. at 858. Strict foreclosures were disfavored because the mortgagee could:

acquire land far more valuable than the mortgage debt, a result considered harsh, oppressive and unfair [while] [f]oreclosure by sale was viewed as a logical way of protecting the debtor's equity in the property while still allowing the mortgagee to recover a deficiency judgment[20] when the proceeds of the sale fell short of the amount owed by the mortgager. Furthermore, during the early development of foreclosure by sale in the United States, the high level of activity in the real estate market justified the conclusion that competitive bidding would assure fair prices. In theory, public sales in such a market would reduce deficiencies and perhaps yield surpluses, which could be paid to mortgagors or junior lienors.

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[20] It has been persuasively argued that deficiency judgments after home mortgage foreclosures result in crushing financial disaster to the mortgagor, impede regional economic recovery in times of severe economic decline, and, provide little, if any, economic benefit to mortgage lenders and that statutorily limiting or eliminating personal liability for deficiency judgments is required to prevent these harsh unnecessary results. See Mixon, Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism that Increases Personal Tragedy, Impedes Regional Economic Recovery, and Means Little to Lenders, 22 Texas Tech. L. Rev. 1 (1991). See also Skilton, Assessing the Mortgage Debtor's Personal Liability, 90 Univ. of Penn. L. Rev. 440 (1941-42).

Id. at 859-60. (citations omitted). Thus, if state mortgage foreclosure sale procedures in fact worked to increase foreclosure sale prices as they were originally intended to do, then § 548(a)(2) would hardly ever be utilized to set aside such a sale because it would result in a price that would actually be reasonably equivalent to the fair market value of the property.

The reality of the foreclosure sale market is quite different, however. Thus, the courts adopting the BFP and Bundles tests are in error when:

> [t]hey assume that state foreclosure procedures are designed to attract bidders and bring the highest price possible under the circumstances for real property. Quite often the opposite is true. Most state real estate foreclosure laws require little in the way of advertising regardless of whether or not sales are judicially supervised.[21]

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[21] See also In re Pruitt, 72 B.R. 436, 446 (Bankr. E.D. N.Y. 1987); In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990).

General Indus., Inc. v. Shea (In re General Indus., Inc)., 79 B.R. 124, 131-32 (Bankr. D. Mass. 1987).

Foreclosure sales often do not produce a bid price that is truly a reasonably equivalent value. Foreclosure sale prices, whether judicial or non-judicial, are usually significantly below actual fair market value "because they reflect the fact that the sale is a forced sale rather than an arm's length, free market sale between a willing buyer and a willing seller." Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 847 (1980). Foreclosure sales are rarely advertised in a manner designed to attract bidders because the mortgagee is usually only required to advertise in legal columns of local newspapers. Foreclosure sales are thus not advertised in the general real estate market and so rarely will be conducted in a commercially reasonable manner. Id. Notice provisions of foreclosure sales are primarily designed to meet due process interests of owners

and lien creditors and not to maximize the sale price. See In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990). The result is that a small group of speculators appears at foreclosure sales intent upon purchasing property for very low prices. Lack of active competitive bidding "frequently results in purchase of the property by the foreclosing mortgagee at a nominal price." Washburn, supra, at 848. In reality, the foreclosure sale purchasers obtain a significant windfall when property is sold for less than a full fair value. Many commentators[22] and a number of courts[23] have noted that result in the typical foreclosure sale. There is little doubt that the fear of losing this windfall in the current foreclosure sale process has engendered much of the opposition to Durrett and is the driving force underlying the

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[22] See, e.g., the Washburn, supra, at 880-81; Kennedy, supra, at 560; Weschler, supra, at 885; Mixon, supra, at 33-34; Skilton, supra, at 444-45.

[23] See In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990); In re Lindsay, 98 B.R. 983 (Bankr. S.D. Cal. 1989).

support of a reasonably equivalent value rule that essentially exempts foreclosure sales. There is no reason to allow commercial entities that follow the minimal requirements of state foreclosure procedures to reap the debtor's equity. To permit them to do so directly conflicts with a crucial policy of § 548 of the Bankruptcy Code - to ensure that bankruptcy estates will not be depleted. See In re Grissom, 955 F.2d 1440, 1447 (11th Cir. 1992).[24]

Further, it should be noted that the mortgagee, who must bid[25] in order to apply the property to the debt and obtain a deficiency judgment "has no incentive to bid fair market value and often bids only a nominal amount, since regardless of the bid amount, the successful mortgagee

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[24] See, e.g., General Indus., Inc,. v. Shea (In re General Indus. Inc.), 79 B.R. 124, 131-32 (Bankr. D. Mass. 1987) Ruebeck v. Atteboro Sav. Bank (In re Ruebeck) , 55 B.R. 163, 168 (Bankr. D. Mass. 1985); In re Lindsay, 98 B.R. 983, (Bankr. S.D. Cal. 1989); In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa.) (1990).

[25] Weschler's empirical study found that mortgagees purchase the property at foreclosure sales at least 75% of the time. Weschler, supra at 870.

obtains title to the property and can realize its market value upon resale." Washburn, The Judicial an Legislative Response to Price Inadequacy in Mortgage Forclosure Sales, 53 So. Cal. L. Rev. 843, 849 (1980). This results in: the mortgagee realizing a double recovery; the mortgagor losing the property and in some cases being subjected to a deficiency judgment;[26] and, due to the inadequate sale price, the mortgagor losing his equity in the property. Further, in bankruptcy the debtor loses his equity exemption, and the unsecured creditors are deprived of their equitable share in the distribution of the estate because the debtor's equity is

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[26] Where there's a low bid, and the market value of the property exceeds the indebtedness, the mortgagor experiences a double loss because the deficiency judgment is often based on the sale price not the market value. Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 850 (1980). See also Mixon, Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism That Increases Personal Tragedy, Impedes Regional Economic Recovery and Means Little to Lenders, 22 Texas Tech. L. Rev. 1 (1991); Skilton, supra at 451. Consumers suffer similar losses when their personal property is sold in the foreclosure process. Shuchman, supra at 620 n.60.

lost at the typical foreclosure sale. This is, of course, precisely what Section 548(a)(2) is designed to prevent.

Additionally, many courts rest their determinations that a rebuttable or an irrebuttable presumption of reasonably equivalent value is derived from the foreclosure sale bid price, in part, on the assertion that foreclosure sales to third party good faith purchasers, represent "arm's length" transactions and should therefore be deemed sacrosanct and unavoidable under § 548(a)(2). See Lawyers Title Ins. Corp. v. Madrid (In re Madrid) 21 B.R. 424 (9th Cir. BAP 1982), aff'd, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S 833 (1984). However, this analysis completely ignores the Bankruptcy's Code's recognition that some fraudulent transfers are, in fact, made at arm's length to a good faith purchaser.

The interests of the third party good faith purchaser are protected by the Bankruptcy Code to the full extent of their investment because the purchaser retains a lien on the

property as security for the purchase price paid for the avoided transfer. 11 U.S.C. §§ 548(c), 550(d). See also Durrett, 621 F.2d at 204 (directing that the property be dealt with "in such manner as will protect the [buyer's] equity therein"); Kennedy, supra at 578-79 n. 196. Therefore, Congress took care to balance the interests of creditors and good faith transferees when providing that constructively fraudulent transfers are avoidable under § 548.

2. There Is No Evidence That § 548 Bankruptcy Remedies Depress Prices At Foreclosure Sales: It Is Equally Possible To Hypothesize That Prices At Foreclosures Are Elevated To Preclude Potential Avoidance Of Sales for Less Than Reasonably Equivalent Value

A second frequently cited rationale posited in support of rendering foreclosure sale bids sacrosanct under Section 548(a)(2) was first articulated in the dissent in Abramson:

> The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This

> tends to depress further the prices of foreclosure sales and thus increase the potential size of the deficiency in each foreclosure.

Abramson v. Lakewood Bank & Trust, Inc., 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J. dissenting) cert. denied, 454 U.S. 1164 (1982). See also BFP, 974 F.2d at 1148; Madrid 725 F.2d at 1202; Alsop v. Alaska (In re Alsop), 14 B.R. 982 (Bankr. D. Alaska 1981), aff'd, 22 B.R. 1017 (D. Alaska 1982).

As Professor Kennedy notes, however, "[t]he argument that application of the Durrett doctrine will encourage bidders at foreclosure or execution sales to lower their bids, attributes to them a perverse incentive to incur the risk of avoidance of their purchases".[27] It fails to recognize

[27] See also Bagley, Mortgage Foreclosures and Deeds in Lieu of Foreclosure: Problems of Bankruptcy and Fraudulent Conveyances, 57 Okla. B.J. 1295, 1299-1301 (1986) (advising foreclosure purchaser to bid reasonably equivalent value); Roberts & Moriarty, Mortgage Foreclosure Sales as Fraudulent Conveyances: The Durrett Issue, 10 Okla. City U.L. Rev. 579, 602 (1985) (advising bidding at least 70% of value of property being sold on foreclosure to avoid risks involved).

that a Durrett-like rule suggesting a 70% benchmark, has the benefit of establishing a reasonable degree of certainty as to whether a bid could be avoided and therefore, is least likely to discourage bidders at foreclosure proceedings. It also fails to recognize that historically the typical foreclosure sale has produced very little in the way of competitive bidding. Skilton, supra, at 445 (empirical study demonstrates "there was practically no competitive bidding at sheriff [or foreclosure] sales.") Further, this purported reason for rendering foreclosure sale bids sacrosanct represents judicial activism at its worst because no empirical evidence supports it. And, in none of the cases citing this rationale has any evidence ever been introduced into the record to support this "finding" by the courts.[28]

[28] See also Resolution Trust Corporation's "Brief for the Federal Respondent" supporting BFP's Petition for Writ of Certiorari, p.7 where Respondent also asserts this rationale without citation to any empirical evidence in support of its position that the BFP irrebuttable presumption rule should be upheld by this Court.

The Ninth Circuit in the instant case utilized this speculative rationale as the primary basis for holding that foreclosure sale prices are per se reasonably equivalent value, asserting that "[a]s has been widely recognized"[29] to do otherwise carries a "strong potential to destabilize mortgage transactions" BFP 974 F.2d at 1148. The court treats the law review article stating this precept as if it took judicial notice of this "fact." Amici submit that there is no basis for the court to take judicial notice of such a precept which is most likely untrue and certainly unproven.[30] In fact, a perusal of

[29] Interestingly, the court only cites to one source for this "widely recognized" concept. Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances Accommdating State and Federal Objectives, 71 Va. L. Rev. 933, 963-64 (1985) (not based on empirical studies). Other law review articles that are based on empirical studies have reached the opposite conclusion. See, Shuchman, Data on Durrett, supra; Schill, An Economic Analysis of Mortgagor Protection Laws, 77 Va. L. Rev. 489 (1991); Weschler, Through the Looking Glass, supra.

[30] In BFP, 974 F.2d at 1149 n.6 the Ninth Circuit asserts that the irrebuttable presumption of foreclosure sale value rule had been adopted by the National Conference of Commissioners on Uniform State Laws in the Uniform Fraudulent Transfer Act § 3(b) (1984) and has been recommended by the ABA's Section of Real Prop.

law review articles based on empirical evidence leads to the contrary conclusion.

Data on the Durrett Controversy, 9 Cardozo L. Rev. 605, 616 (1987),[31] persuasively demonstrates that in the circuits employing Durrett and its progeny there have been no negative effects engendered at foreclosure sales. It also persuasively points out that if there had actually been such dire consequences, as the BFP courts predict, then surely the mortgage lenders advocating the rejection of a Durrett rule wold have provided such empirical evidence to the court in the 1984 Madrid case at which point in time Durrett had been the law for four years. No such evidence was

Rep. 106B. However, Data on Durrett, supra, at 614-618 demonstrates that this "authority" for BFP's position is also imagined, stating that the National Conference of Commissioners and the ABA relied on the same unproven fears of the "dire" effects on the markets of Durrett as is oft repeated in the literature and by the courts.

[31] See also In re General Industries, Inc., 79 B.R. at 133 (Bankr. D. Mass. 1987); In re Lindsay, 98 B.R. 983 (Bankr. S.D. Cal. 1989); In re Brasby, 109 B.R. 113, 125 (Bankr. E.D. Pa. 1990).

presented. Id. at 614-616. In Data on Durrett it is noted that "neither in the April 1983 Senate Hearings on S.445 - which would have changed Section 548 of the Bankruptcy Code to undo the Durrett doctrine - or elsewhere since then could we find any empirical evidence of the claimed bad consequences." Id. at 614. This study of the effects of Durrett on the mortgage lending market and in subsequent foreclosure sales markets clearly demonstrates that these purported "policy" concerns are imagined.

Thus, the argument that the BFP rule increases foreclosure sale prices while a Durrett-like rule would decrease foreclosure sale prices is not only historically inaccurate, it is based on mere assumptions which assumptions, by virtue of repeatedly being re-stated in subsequent court decisions and in the journal literature, are being treated as "well-stablished" fact. This Court should not permit these chimerical policy concerns to dictate a rule of federal law.

3. There Are No Grounds For Assuming That Protecting Against Windfall Profits On Sales That Are For Less Than Reasonably Equivalent Value Will Increase The Cost Of All Mortgage Lending

Lastly, another one of the most often cited policy considerations advanced in support of the contention that foreclosure sales should be irrebuttably presumed to be a "reasonably equivalent value" is that a Durrett-like value rule, such as Amici propose - to compare the value received by the debtor with the fair market value of the transferred property - would destabilize the mortgage market because, inter alia, it would increase the costs of mortgage loans.[32]

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[32] A Durrett-like rule using 70% as a benchmark allows more than enough leeway within which to take into account the vagaries of the market and varying sale conditions. Even if a totality of circumstances test is deemed to be appropriate, the typical foreclosure sale price should only be one minor factor in the analysis because, as previously discussed, foreclosure sales represent inherently unreasonable value due to the fact that they are commercially unreasonable. See Section III. B.1 this brief, supra. Given that the purpose of § 548(a)(2) is to recoup equity lost to the estate by constructively fraudulent pre-petition transfers of real property, any rule adopted by this Court that fails to ensure the maximization of the equity available to unsecured creditors would undermine the Bankruptcy Code.

According to the Ninth Circuit, "[n]egative repercussions would also be likely in the lending arena, where creditors would be less willing to lend funds on the security of a mortgage or deed of trust." Madrid, 725 F.2d at 1202.

A study of the markets after Durrett clearly demonstrates that the empirical evidence totally contradicts these dire predictions of the courts and the mortgage lenders. In Data on Durrett it was stated that "the . . . statistical data on interest rates, loan to price ratios, and total loans created before and after these decisions show that Durrett and Madrid made little, if any, apparent differences either way in those variables" Shuchman, supra, at 615-616. The empirical data "very strongly suggest that the interest rates and the total mortgage loans created ... have all followed national averages regardless of whether a state . . . had adopted or rejected Durrett." Id.

This study demonstrates that the dire predictions of the effects of the Durrett federal redemption doctrine "in the

journal literature and the judicial opinions cite almost no empirical evidence" in support of their predictions such as, inter alia, decreasing the amount, types and extent of credit available, increasing interest rates, and decreasing the amount and availability of financing for the purchase of foreclosed property. Id. Thus, predictions of dire economic consequences for foreclosure sales and credit costs if a Durrett-like reasonably equivalent value rule is adopted are simply speculative fears repeatedly asserted by mortgage lenders. This court should not permit such imagined and unproven concerns to determine the standard for reasonably equivalent value in § 548(a)(2) of the Bankruptcy Code.

IV. CONCLUSION

For all of the foregoing reasons, the decision of the Ninth Circuit Court of Appeals that foreclosure sale prices are irrebuttably presumed to represent reasonably equivalent value should be reversed and this Court should state that reasonably equivalent value is determined by comparing the fair market value of the property with the price obtained at the foreclosure sale.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 06 1993
OFFICE OF THE CLERK

No. 92-1370

In The

Supreme Court of the United States

October Term, 1993

In re: BFP, a Partnership,

Debtor,

BFP, a Partnership,

Petitioner,

vs.

RESOLUTION TRUST CORPORATION as Receiver of Imperial Savings & Loan Association; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR JIM WALTER HOMES, INC. AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR JIM WALTER HOMES, INC. AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF JIM WALTER HOMES, INC.,

Jim Walter Homes, Inc. is a Florida corporation having its home office in Tampa, Florida. The nature of business of the company is the financing and construction of single family homes in various stages of construction from a shell to a completed, two-story home. By the very nature of the company's market, it is largely limited to building and financing homesteads for low-income families, including those on some form of disability compensation or social security benefits.

The company actively does business in twenty-three states, namely, Oklahoma, Texas, Louisiana, Arkansas, Missouri, Georgia, Alabama, Florida, North Carolina, South Carolina, Virginia, Kentucky, Tennessee, New Mexico, Illinois, Arizona, Mississippi, Ohio, West Virginia, Pennsylvania, Maryland, Indiana, and Delaware.

Jim Walter Homes, Inc. presently services a mortgage loan portfolio of $4,180,000,000.00 covering 88,500 accounts in those states. The company's default ratio is 4.47% compared with the national average reported by the American Banker's Association of 5.26%. The relative success of this company is based primarily upon an aggressive loan servicing system of field personnel as well as an aggressive foreclosure policy. As such, the company is active in obtaining title to defaulting properties and immediately re-selling them to third parties. Such activity is the very *lebensblut* of the company's survival in such a volatile market. To require the holding of

such acquired houses for one year following foreclosure sale by reason of § 548 would involve the interest paid on the investment, and the payment of insurance and taxes, as well as the management of the houses to minimize vandalism, theft, and deterioration from the elements. It is fundamental knowledge that in the winter homes must be heated in order to avoid deterioration.

By reason of the vast experience of the company in the mortgage foreclosure arena, we feel our participation in this appeal lends a vast reservoir of experience in foreclosure law and how that experience relates to the increasing number of bankruptcies. The ability to sell repossessed properties without uncertainty or restraint is the very essence of the company's success in maintaining a stable mortgage portfolio.

The company recently participated in the case of *Rake v Wade*, 113 S.Ct. 2187 (1993), since Wade is the Trustee of a portion of the company's mortgage portfolio. A Bankruptcy decision such as the one at bar is crucial to the ability of the company to recover and re-sell properties which have been the subject of foreclosure. There is a need for uniformity throughout the United States such that companies that do business must be able to rely upon applicable substantive state law as to the validity of foreclosures rather than some arbitrary floor or a case by case analysis one year later after the property has been sold to an innocent third party.

STATUTORY PROVISIONS INVOLVED

Sections 101(54), 548(a)(2)(A), 548(d)(1) of the Bankruptcy Code, 11 USC are involved in this case and are set forth in the Appendix, *infra*.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The various state laws wherein Jim Walter Homes, Inc. conducts business and the standards relative to vacation of foreclosure sales are discussed for the Court's consideration.

2. The majority of states discussed utilize power of sale or trustee sales without appraisal or requirement for minimum bid. The majority of those states will not vacate a sale based upon minimum bid alone absent fraud, mistake, collusion, or other defect in the sale; the minority of the states discussed will vacate a sale if the price bid is so low as to "shock the conscien of the court." Most of the states do not inquire as to market value unless the proceeding involves a request for deficiency judgment. Very few states require a two-thirds bid of a court appraised value before the sale is judicially confirmed.

3. It is not fraud to perform an act or fail to perform an act which the law allows. It is not a fraudulent conveyance nor are creditors injured by the sale of a homestead since that exempt property is beyond the reach of creditors.

4. It is the general rule that a transfer prior to bankruptcy of exempt property is not affected by the failure to claim the previously transferred property as exempt since

pre-filing exempt property does not pass to the trustee and is of no concern to the trustee or the creditors he represents.

5. Congress has expressed a policy of special treatment of mortgages upon the homesteads of Debtors. Congress has not expressed a policy of disregard of substantive state law as it relates to mortgage foreclosure sales and state tax sales.

6. It cannot be inferred by the Courts that Congress intended to preempt state substantive law as it relates to foreclosure sales and tax sales.

ARGUMENT

A GENERAL OUTLINE OF THE LAW OF THE STATES WHEREIN THE AMICUS DOES BUSINESS INDICATES MOST STATES UTILIZE POWER OF SALE AS A FORECLOSURE DEVICE. A MINORITY OF STATES REQUIRE JUDICIAL FORECLOSURE WITH APPRAISAL AND A MINIMUM BID OF TWO-THIRDS OF THE APPRAISED VALUATION.

A consideration of the states wherein *amicus*, hereinafter termed JWH, does business indicates the diversity of state law applicable to foreclosures and the consideration paid at those foreclosure sales.

Oklahoma: Oklahoma requires foreclosure by action wherein, prior to sale, the property is appraised by court-appointed appraisers. To purchase the property, *any* bidder must bid at least two-thirds of the appraisal. The time and place of the sale is advertised by publication and mailing for three consecutive weeks and by mailing the

notice of sale to all other interested parties. The sale is subject to judicial review at confirmation of the sale. Mere inadequacy of price in absence of fraud or irregularity is not a ground for refusal to confirm the sale. *City of Wewoka v Fink*, 173 P.2d 936 (Okla. 1946). The Court there held at 938:

> The only test a court can have of the value of property sold at a *forced* sale is the price it would bring on due notice at a public sale fairly conducted.

Missouri: That state does not require appraisal, nor are there provisions for a minimum bid in their non-judicial foreclosures. Again, mere inadequacy of consideration is not sufficient to invalidate a sale in absence of fraud as evidenced by gross inadequacy of consideration, the test being the price should not be so low as to "shock the conscience of the court." *Blades v Ossenfort*, 481 S.W.2d 531 (Mo. App. 1972), or "so inadequate as to shock the moral sense and outrage the conscience." *Robert R. Wisdom Oil Co., Inc. v Gatewood*, 682 S.W.2d 882 (Mo. App. 1984).

Mississippi: Foreclosure sales are conducted without a minimum bid or appraisal. An early case approved a sale of 50% of the value of the land. *Triplett v Bridgeforth*, 38 So.2d 756 (Miss. 1848). More recently, where the market value was $392,897.00 of property, and appellees established a total indebtedness of $185,530.00, a bid of $85,530.00 resulted in a conveyance to the purchaser at the sale. See *Lake Hillsdale Estates, Inc. v Galloway*, 473 So.2d 461 (Miss. 1985). The rule was amplified in *Wansley v First National Bank of Vicksburg*, 566 So.2d 1218, 1225 (Miss. 1990) as follows:

> Subject to our otherwise governing statutes, we declare that, if the secured creditor is authorized to foreclose by power of sale, after the debtor's default and upon compliance with the deed of trust or other instrument, the secured creditor may sell any or all of the real estate that is subject to the security interest in its then condition or after any reasonable rehabilitation or preparation for sale. Every aspect of the sale, including the method, advertising, time, place, and terms, must be commercially reasonable. This is an objective standard.

New Mexico: No appraisal or minimum bid is required at judicial sales. The test is that the bid must not be so low as to shock the conscience of the court.

Kentucky: Sales are conducted pursuant to court order where after required appraisal, a bid of two-thirds is required to cut off redemption rights. If a bid is for less than two-thirds, the owner may redeem by paying within one year from sale date the original purchase money together with ten percent interest.

Alabama: Power of sale is the mode of foreclosure where there is neither minimum bid nor prior appraisal. The standard of review is to set aside the sale if the price is grossly disproportionate to the real value of the property.

Tennessee: This state utilizes Trustee's sales without any requirement of an appraisal or a statute providing for a minimum bid.

West Virginia: This state utilizes power of sales.

Illinois: Illinois utilizes judicial sales with no appraisal and no minimum bid. The standard there is "fair and reasonable" as to amount of bid.

Ohio: Judicial sales are performed with appraisal and a requirement of two-thirds of the appraisal as a minimum bid.

Arkansas: Judicial sales are performed with appraisal and a requirement of two-thirds of the appraisal as a minimum bid.

Georgia: Georgia utilizes power of sale procedure. There is no prior appraisal and no statutory requirement for minimum bid. Within 30 days after the sale, to preserve a deficiency balance, an *in personam* action must be brought wherein it is established the property was sold for fair market value.

Texas: This state utilizes trustee's sales with no required appraisal and no statutory requirement for minimum bid. If a deficiency is sought, a hearing is conducted to determine the fair market value as of the date of sale. If no request for determination of the fair market value is made, the sale price will be used by the court to compute the deficiency.

Florida: Judicial sales are conducted with no appraisal and no minimum bid provided for.

South Carolina: Judicial sales are conducted with no appraisal and no minimum bid provided for.

North Carolina: Power of sales are utilized with no appraisal nor minimum bid.

Virginia: This state utilizes Trustee sales with no appraisal or minimum bid.

Louisiana: Judicial sales are conducted with appraisal and required two-thirds bid of the appraisal under writ *fiera*

facias. There is an alternate procedure called "executory process" wherein there is no appraisal and no minimum bid required.

Indiana: By statute judicial sales do not require appraisal or is a minimum bid provided for.

Delaware: Delaware utilizes power of sale with no minimum bid required.

Arizona: Arizona utilizes judicial sales and trustee sales, neither of which requires a minimum bid nor a prior appraisal. In that state, where the judgment creditor bid $367.41 for property with a net equity value of between $1,500 and $6,353, this 5-7% equity bid did not shock the conscience of the court. See *Mason v Wilson*, 116 Ariz. 255, 568 P.2d 1153 (1977). *Contra Homecraft Corp. v Fimbres*, 119 Ariz. 299, 580 P.2d 760 (1978) where the judgment creditor bid $623.38 and acquired a $10,000 equity, it was not error to set aside an execution sale. Arizona follows the general rule that mere inadequacy of price is not adequate to set aside an execution sale, but where the inadequacy is so great as to shock the conscience of the court, such will authorize the court to set aside the sale and order a new one.

IN POWER OF SALE STATES, THE MAJORITY RULE IS THAT INADEQUATE PRICE ALONE, ABSENT OTHER FACTORS, IS NOT A GROUND TO VACATE A SALE. THE MINORITY RULE APPLIES THE TEST OF A BID SO GROSS AS TO SHOCK THE CONSCIENCE OF THE COURT.

As can be seen by the above list of procedures, at least in the states where JWH is actively pursuing foreclosures, the preferred method is power of sale with no

requirement for appraisal and no requirement for a minimum bid. In those states where appraisal is required, we see that a bid of two-thirds of the appraised valuation is the minimum bid.

The general rule relating to power of sales in most states is that inadequate price is *alone* not sufficient to set aside the sale; however, gross inadequacy coupled with other circumstances showing unfairness or fraud will suffice. In other states, the minority rule is to evaluate the bid to determine if the amount is so low as to shock the conscience of the court.

One recent federal case regarding Nevada property but applying federal law is *U.S. v McKenzie*, 322 F. Supp. 1058 (D. Nevada 1971), *aff'd* 474 F.2d 1009 (9th Cir. 1983) which held that a disparity between the sale price and the market value was $16,550. Such a spread was held not to be so great as to shock the conscience of the court, citing *U.S. v Wells*, 403 F.2d 596 (5th Cir. 1968) and *Magnolia Springs Apts. v U.S.*, 323 F.2d 726 (5th Cir. 1963). The court approved a deficiency judgment of $89,907.35.

Berman v Nat. Acceptance Co. of America, 239 F. Supp. 767 (WD TX 1965) applied Texas law in a deed of trust sale. The court there observed at 770:

> Since the exercise of a power under the trust is a harsh remedy, the state courts have insisted on rigid adherence to the various requirements by statute and in the trust instrument itself . . .

There, the bid was $60,000 at the sale; the court held a $23,000 difference was not sufficient to vitiate the sale, the law of Texas being mere inadequacy of price alone is

not grounds for setting aside a sale. There must be something more, such as fraud or collusion.

In those states where inadequacy alone is not sufficient to set aside a sale, we submit the following authorities:

See *Britt v Smith*, 169 S.E.2d 482 (N.C. 1969); *Clarimont Development Cop. v Trust Co. Bank*, 233 S.E.2d 37 (Ga. 1977); *Musgrove v Glasgow*, 188 S.Ed.2d 94, 96 (Va. 1972) where the bid was one-third the value of the property, and the court approved the sale in absence of fraud; *Hodges v Wellons*, 175 S.E.2d 690, 692 (N.C. 1970) approved a sale where the bid was $625 for property valued at $2,600 where the court observed that "the only obligation of the trustee . . . was to conduct and consummate the foreclosure sale in accordance with law." In Georgia, it is only when gross inadequacy of price is accompanied by fraud, mistake, apprehension, surprise or other circumstances that brought about the inadequacy that a sale may be set aside. See *Giordano v Stubbs*, 184 S.E.2d 165, 169 (Ga. 1971). A case of first impression in Arizona is *Security Sav. and Loan Ass'n v Fenton*, 806 P.2d 362, 364 (Az. 1990) where it was ruled that a trustee sale cannot be set aside for inadequacy by holding that the statute relating to deficiency judgments protects the debtor where fair market value is then considered. In *Myles v Cox*, 217 So.2d 31, 34 (Miss. 1968) a bid of $3,218 was approved where the value of the property was between $6,500 and $8,000. In Florida, *Shipp Corporation, Inc. v Charpilloz*, 414 So.2d 1122, 1124 (Fla. 1982) approved a sale where the value was in the range of $2,800,000 to $3,200,000 and the bid was $1,100,000, the court saying:

> . . . a forced sale seldom brings the property's true value.

In Tennessee, a sale price of $30,000 where land was worth $90,000 was not considered inadequate by the court. See *Watson v United American Bank of Knoxville*, 588 S.W.2d 877, 882 (Tenn. 1979); however, the sale was invalidated because notice of the sale was not sent to the owner, but the rule in that state is inadequacy alone is not adequate to set aside a sale.

In Texas, absent irregularity, mere insufficiency of bid is not enough to set aside a sale. *Forestier v San Antonio Sav. Ass'n*, 564 S.W.2d 160 (Tex. Civ. App. 1978) at 165, citing as authority the Texas Supreme Court in *Tarrant Savings Ass'n v Lucky Homes, Inc.*, 390 S.W.2d 473 (Tex. 1965).

The following authorities are submitted for those states which examine the bid price as being so gross as to shock the conscience of the court:

Waring v Guy, 237 A.2d 763, 767 (Md. 1968) *citing Lewis v Beale*, 162 Md. 18, 158 Atl. 345 (1932):

> The fact that the court must consider the question at bar with reference to the circumstances that the standard is that of a forced sale, fairly made, rather than a voluntary sale by the owner, is due to the default of the debtor, who must assume the agreed consequences of the default. If the sale takes place during a period of financial depression, or of depreciation of the value of land, or of other adverse conditions for which neither party is responsible, and hardship thereby results, it is a consequence which must be borne as an incident of the contract, and the

> court cannot relieve one party to the contract without violating the contractual right of the other.

Other cases which examine the gross disparity of the value and the bid price are *Rife v Woolfolk*, 289 S.E.2d 220 (W. Va. 1982) where the disparity was a bid of $8,000 for property valued at $62,000; *Smith v Equitable Life Assurance Society of U.S.*, 448 S.W.2d 588, 594 (Mo. 1970) where the property had a value of $35,000 and the sale price was $16,700 and the court held the bid did not represent a gross inadequacy.

Indiana looks at the situation somewhat differently in that the test is the entry of a deficiency judgment which is shocking to the court's sense of conscience and justice, holding that mere inadequacy of price alone may be sufficient to justify setting aside the sale, the test there being the price paid must be so great as to shock the sense of justice and right. *Arnold v Melvin R. Hall, Inc.*, 496 N.E.2d 63, 65 (Ind. 1986). However, an allegation of inadequate price is not in and of itself insufficient to set aside the judgment for the reason in Indiana the law presumes that the successful bid at sheriff's sale is the fair market value of the property, even though there was only one bidder, i.e., the mortgagee. The mortgagor bears the burden of proving the disparity between price and value should be shocking to the court's conscience.

Such is a reasonable summary of state substantive law governing the conduct of power of sale foreclosures. In those states which require foreclosure by action which uniformly require a bid of two-thirds of the appraised valuation, there is no real problem, except that all such sales would be voided under Petitioner's bright line rule

of 70%. It is in those states where a power of sale or trustee's sale is utilized that a controversy arises.

A typical scenario is as follows: Jim Walter Homes at a sale under power bids in 1990 $5,575, that being the balance of its mortgage. The property was thereafter sold to a third party for $10,000 *cash*. That purchaser sold the property 90 days later to a neighbor who wanted the property because it adjoined his property for a price of $17,500. Now, a year later the bankruptcy court desires to apply the 70% rule to a valuation and obtain the difference from the mortgage company. Jim Walter Homes broke no law, engaged in no collusion or fraud, and the question begs if it is fair and lawful that American business is to be conducted under this cloud.

IT IS NOT CONSTRUCTIVE FRAUD TO DO WHAT THE LAW ALLOWS.

A CONVEYANCE OF HOMESTEAD WHICH IS EXEMPT FROM THE CLAIMS OF UNSECURED CREDITORS FURNISHES NO GROUND FOR COMPLAINT UNDER FRAUDULENT CONVEYANCE LAW.

A PRIOR CONVEYANCE OF HOMESTEAD PASSES NO RIGHTS TO THE TRUSTEE IN BANKRUPTCY AND IS OF NO CONCERN TO THE TRUSTEES OR THE CREDITORS.

The legal basis for setting aside a state law foreclosure proceeding where the property was sold in strict conformity with state law is constructive fraud; however, it is fundamental law that it is not fraud to do what the law allows and provides for.

> . . . the law will not deduce fraud from any number of acts, each of which is lawful and

innocent in itself. 37 CJS, Fraudulent Conveyances, § 7, p. 856.

In all of the foreclosures conducted by Jim Walter Homes, Inc. throughout the states, the transfers by sale involve the homestead of the mortgagors. In all those states, the homesteads are exempt property.

> . . . as a general rule a conveyance of a homestead which is exempt from liability from debts is not a fraud on creditors and furnishes no ground for complaint. 37 CJS, Fraudulent Conveyances, § 31, p. 878.
>
> . . . fraud in order to be actionable must result in injury, and the creditor is not injured by a conveyance of property which he cannot subject to his claims. *Ibid.*

Examples of state courts which have sustained the general rule that it is not fraud to do what the law allows are *The Colonial Nat'l Bk v J. H. Bredenkamp, Jr.*, 151 Ind. App. 366, 279 N.E.2d 845, 848 (1972) and *Earl v Liberty Loan Corp. of West Monroe, Inc.*, 193 So.2d 280, 282 (La. App. 1966)

Federal Courts which have applied the law declaring that it is not a fraudulent conveyance when the asset is the exempt homestead are *Smith v Jackson State Bank*, 63 F.2d 934, 936 (10th Cir. 1933); *Sieb's Hatcheries, Inc. v Lindley*, 209 F.2d 674, 676 (8th Cir. 1954). The Tenth Circuit involved a bankruptcy case in *Rutledge v C.R. Johansen*, 270 F.2d 881 (10th Cir. 1959). That case involved an action by the trustee to set aside a voidable preference under 11 USCA §§ 96, 64 and 60, subs, a and b. The bankrupt had made a conveyance in satisfaction of an antecedent debt involving his homestead and did not claim an exemption

in his schedules. The court in holding that such a transfer does not give rise to a voidable preference stated:

> The statement is grounded in the legal concept that property exempt by law remains in the bankrupt, does not pass to the trustee, and the bankrupt's disposition of it prior to bankruptcy is therefore of no concern to the trustee or the creditors he represents. Citing *Lockwood v Exchange Bank*, 190 U.S. 294, 23 S. Ct. 751, 47 L.Ed. 1061; *First National Bank of Cleveland v Orten*, 43 Okl. 325, 142 Pac. 1096; Annotation 161 ALR 1013-1018. 270 F.2d at 881.

Countering the argument the bankrupt did not claim the exemption at the later bankruptcy, the court said "if the bankrupt had the right to transfer his exempt property prior to bankruptcy without committing a voidable preference, there was no exemption rights to be exercised in bankruptcy, and appellant's argument must fail." The court held the active steps to claim bankruptcy exemptions provided for in the Code apply only to property of which the bankrupt was seized at the time of filing. To hold otherwise would be to give creditors a right to exempt property they did not have prior to the filing. 270 F.2d at 882.

It is appropriate, however, to point out that *Rutledge* was distinguished in the later case of *Mansell v Carroll*, 379 F.2d 682 (10th Cir. 1967). The same Jurist who decided *Rutledge* pronounced the decision. In *Mansell*, the transfer was not free of fraud. Although acknowledging the law in *Rutledge* " . . . is, wisely, the general rule of law . . . " in this case there was an active plan and a scheme on the

part of the bankrupt and his wife to transfer the property for a fraudulent purpose. 379 F.2d at 684.

One cannot leave this point of law without examining *Lockwood v Exchange Bank*, 190 U.S. 294, 23 S.Ct. 751, 47 L.Ed. 1061 (1903). That case involved the bankruptcy act of 1898 regarding property which is exempted by the law of the state in which the debtor resides. The case stands for the proposition that the exempt property does not pass to the trustee, even if the bankrupt has under the law of the state waived his exemption in favor of certain of his creditors. This was evidently the law under the bankruptcy act of 1867 as well. *In re Bass*, 3 Woods 382, 384 (1877) which said:

> In other words, it made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made, but whether so or not, it is not for the bankruptcy court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not.

The court noted that the fact the act of 1898 gave the bankruptcy court authority to control exempt property afforded no ground for holding that the court of bankruptcy must administer and distribute such property.

It is to be noted as well that the current Code 11 USCS § 522(b)(2)(B) also excludes property of the estate

"to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law."

This line of law is the very reason why the *amicus curiae* position of Jim Walter Homes, Inc. is important to a complete examination of the case at bar.

THE BUTNER RULE SHOULD APPLY TO THIS CASE TO JUSTIFY THE APPLICATION OF STATE SUBSTANTIVE LAW TO THE TEST OF FRAUDULENT CONVEYANCE.

The Supreme Court has graciously consented to consider an unusual number of bankruptcy cases in the recent years. Such cases are not mundane or dog cases but are important to the very fabric of the economic engine of this country. The reason they have become so important is to cure the penchant of the lower courts on frequent occasion to ignore the plain language of the statute, not paying attention to the plain language of the text. In so doing, those lower courts have frequently ignored fundamental substantive state rights.

Such a concern was voiced in *Dewsnup v Timm*, 112 S.Ct. 773, 779 (1992) relating to the relative ease in which the lower courts were reducing the secured creditor's lien involuntarily by means other than full payment. The serious practice of applying this violence toward chapter 13 secured creditors upon the residence of the debtor by bifurcation or lien splitting was as well halted in *Nobleman v American Sav. Bank*, 113 S.Ct. 2106 (1993). What is clear from a reading of *Nobleman* is that in absence of a controlling federal rule, the determination of property

rights as enunciated in *Butner v United States*, 440 U.S. 48, 54-55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979), has been left to state law, subject, of course to the alteration of remedies of a mortgagee. See *United Savings Assn. of Texas v Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 369-370, 108 S.Ct. 626, 629-630, 98 L.Ed.2d 740 (1988).

Nobleman made it clear, at least under 11 USCS § 1322(b)(2), the lower courts cannot modify the mortgagee's rights to interest rates, payment amounts, *"and other contract terms."* This last term, in *Rake v Wade*, 113 S.Ct. 2187 (1993), this court by reading the plain text of the Bankruptcy Code (§ 1325(a)(5)) reversed over fifteen circuit judges who had refused to give attention to text in denying interest to a secured creditor who was forced to forebear the arrearages over several years without interest.

Now, the Court is called upon again to halt another transgression of the lower courts in their slavish adherence to *Durrett v The Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980). That case is flawed in several instances. In the first place, there is no judicial basis for the arbitrary assessment of a 70% guideline for the courts to follow doggedly. There is no federal statute relating to such a guideline; there is no word in the bankruptcy act which would come close to validate such an application. Had the Fifth Circuit adhered to state law of Texas, they would have seen that mere inadequacy of price at a sale is alone insufficient to set aside a sale, absent fraud, mistake, etc. As well, their stating that they had been unable to find a case where a sale of less than 70% under the Bankruptcy Act had been approved was the barest form of dictum. See *In re Littleton*, 888 F.2d 90, 92 (11th

Cir. 1989), which condemned the "bright line" rule of *Durrett*, claiming that failing to realize that other factors are just as important, such as the bargaining position of the parties and the marketability of the property, that a sale in a foreclosure market brings less than one in a retail market, and that sale of property worth $1,000,000 for $700,000 might not constitute reasonably equivalent value even though the 70% standard is met. The Eleventh Circuit rejected that bright line rule since it would produce an unfair result, especially in light of the fact the sale extinguished junior liens on the property.

In vacating the lower court's talismanic adherence to the 70% rule, *Matter of Grissom*, 955 F.2d 1440 (11th Cir. 1992) was laudable in its criticism of both *Durrett* and *Littleton*. Certain points were made in that case which are worthy of examination:

> Absent fraud, collusion, or irregular or unlawful procedures, courts should presume that a legitimate foreclosure sale brings a price which is reasonably equivalent to the property's value.
>
> In addition, courts should consider whether or not the foreclosing party obtained a fair appraisal of the property before selling it, the extent to which the foreclosure sale was advertised, and the competitive conditions surrounding the sale.
>
> On the other hand, we also realize that allowing commercial entities to ignore equity in foreclosure proceedings undermines one crucial policy of Section 548 – ensuring that bankruptcy estates will not be unnecessarily depleted.
>
> Nullifying a legitimate foreclosure sale solely because the market for the property sold could

not bring 70% of the property's value may advance bankruptcy policy, but it also violates the policy protecting the rights of secured creditors and diminishes the integrity of foreclosure sales.

Similarly, we allow the interests of secured creditors to trump bankruptcy policy when we give a commercial lender *carte blanche* to ignore the equity interests of a borrower as long as the lender follows the minimal requirements of state foreclosure law.

After all, sale prices obtained at regularly conducted, non-collusive, lawful foreclosure sales are presumed to be reasonably equivalent values, unless the bankruptcy trustee establishes otherwise. 955 F.2d at 1446-1449.

The Sixth Circuit's view reflected *In the Matter of Winshall*, 758 F.2d 1136 (6th Cir. 1985) is probably the most rational approach to the tension between state substantive law and § 548. Congress does not write "on a clean slate" when it enacts bankruptcy statutes. *Dewsnup v Timm, supra*, at 779. When Congress sought to continue the fraudulent conveyance statute, it did so with the dictates of *Butner* clearly in mind. If we are to give effect to that most cited case, then the holding of *Winshall* is most appealing:

> While the power of the trustee to avoid certain preferential transfers was clearly intended to assure the equitable distribution of a debtor's assets among unsecured creditors, it can hardly be argued that Congress intended the rights of such creditors necessarily to override those of good faith purchasers at state foreclosure sales

or the policy judgments of states in balancing the interests of parties thereto.

The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This tends to depress further the prices of foreclosure sales and thus increases the potential size of the deficiency in each foreclosure. 758 F.2d at 1139

Even if the sale in question were a transfer subject to § 548, the better view is that reasonable equivalence for the purposes of a foreclosure sale under § 548(a)(2)(A) should be consonant with the state law of fraudulent conveyances.[1]

In the Matter of Bundles, 856 F.2d 815 (7th Cir. 1988) attempted to reconcile § 548 with the dictates of the wisely decided *Butner*, but fell back upon the issue they could not concern themselves with the policy considerations of ignoring state law but instead read § 548 as establishing "a federal basis – independent of state law – for setting aside a foreclosure sale." 856 F.2d at 822. The court, however, softened the application of *Durrett* and fell back to a case-by-case adjudication:

> Consequently, it is appropriate to consider, as a starting point, the fair market value. However,

---

[1] It is important to note that Michigan law provides that inadequate sale price, in and of itself, is an insufficient ground for setting aside a foreclosure sale by advertisement. There must be both a grossly inadequate sale price and some other defect such as fraud, mistake, unfairness, or irregularity.

the fact that the sale was the result of a foreclosure rather than an arm's length transaction between a willing buyer and a willing seller is also of considerable importance. Therefore, the bankruptcy court must focus ultimately on the fair market value as affected by the fact of foreclosure. As a practical matter, the foreclosure sale price is the only means of measuring the effect of foreclosure on the value of the property . . . However, the bankruptcy court also must examine the foreclosure transaction in its totality to determine whether the procedures employed were calculated not only to secure for the mortgagee the value of its interest but also to return to the debtor-mortgagor his equity in the property. The bankruptcy court therefore must consider such factors as whether there was a fair appraisal of the property, whether the property was advertised widely, and whether competitive bidding was encouraged.

The court refused to follow state law and refused to hold a regularly conducted, noncollusive foreclosure sale should automatically be deemed a reasonably equivalent value within the meaning of § 548.

The above cases, together with the plethora of cases from the inferior courts which follow *Durrett* and which refuse to follow that case, or have modified the approach by the refusal to follow the impact of substantive state law, places this case in the same posture as *Nobleman, Dewsnup, Rake,* and *U.S. v Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026 (1989). We are faced with the arbitrary refusal to accord state law property rights in a bankruptcy context. Instead, the courts refuse to follow *Butner* but have

chosen to fashion what is the rare pre-emption by Congress of state substantive property law the rule rather than the exception. One can only look at the record and observe what was said *In the Matter of Southern Land Title Corporation*, 474 F.2d 1033, 1039 (5th Cir. 1973): "The record in this case does not carry the fresh air of spring, the scent of sweet olive in bloom, and the pleasing thought of young innocents at play."

If we accept the argument of the Petitioner in this case, consider if this would not be an appropriate requirement in a title opinion by a prudent practitioner in the field of practical experience:

> It is to be noted that title of the grantor was obtained as a result of a bid at a foreclosure sale under deed of trust. Although all aspects of the sale were in conformity with state law (including the fact that the property was not required to be appraised prior to the sale), the examiner is unable to ascertain from the record whether or not the bid at the sale was for a reasonably equivalent value (whatever that term means). Since the sale took place last month, you should not consider taking title to this property until one year has passed from the sale date in order to avoid the possibility a trustee in bankruptcy may void the sale, taking the property away from you but allowing you a lien for the amount of your purchase price. Naturally, if you ignore this admonition, you are advised that it would be imprudent for you or your wife to make any improvements in the property since the trustee in bankruptcy would be the beneficiary of those improvements and you would be the loser.

Amici for the Petitioner have brought up an interesting point in applying § 548 to tax sales. They complain that in two instances the debtors did not pay their taxes on their homesteads and lost them to tax sales. *Amicus* Frank Allen, lost his home "for a mere 1% of the appraised valuation; *Amicus* McKeever's home was sold at tax sale for only 9% of its value."

Without a diatribe and examination of all of the state laws on tax sales, we shall examine Oklahoma's procedure. If a taxpayer decides not to pay his taxes, one may obtain from the County Treasurer a tax certificate for the payment of the delinquent taxes and collect, upon payment, the munificent sum of 8% interest. If the third party accumulates three years of tax certificates, he may apply for a tax deed by filing an application and notifying the owner under due process. As well, where the county has bought the property for taxes, it may offer the property to the highest bidder at a treasurer's tax sale.

It might be appropriate to point out that in Oklahoma we have 77 counties, each with their obligation to raise revenues from their *ad valorem* tax base. Over half of those counties are unable to advertise and mail notices of tax sales for the reason the cost involved exceeds their available funds. To invade the sovereignty of states and counties to conduct tax sales under § 548 touches upon a Tenth Amendment invasion. See *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1984).

Amici for the Petitioner have afforded this Court a valuable service in that they have pointed out the potential disaster that will be wrought upon the thousands of

taxing entities of the states if this Court is to rule that substantive state law of the individual states is pre-empted by § 548. It simply would mean that no purchaser of property from a county could dispose of the property acquired at a tax sale for a period of one year out of fear of attack by a bankruptcy trustee. And the guarantee of a lien afforded to such purchasers for and in the amount of their investment really affords a rather empty promise.

In the context of tax sales, again *Amici* argue that voiding tax sales would achieve the over-riding policy of § 548 – to ensure that bankruptcy estates would not be depleted. Again, most of these instances, where applicable to a chapter 13 debtor(s), involve homesteads and exempt property. There, general creditors would not have been injured by the tax sales since they would not have had access to the homestead to satisfy their claims. And, it is clear, that such property does not pass to the trustee and is not part of the bankrupt estate, a point that *Amici* for the Petitioner has neglected to address.

Some courts have held that it is not within the purview of the judiciary to establish the policy of bankruptcy law. For example, see *In the Matter of Bundles, supra:* "It is beyond our scope of review to consider the policy implications of permitting the debtor to set aside the foreclosure of his home." 856 F.2d at 822.

As early as 1938 it was established by this court that congress has the power to alter state property rights. *Wright v Union Central Life Insurance Co.*, 304 U.S. 502, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938) clearly stated the power:

If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the states, it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state law. A familiar instance is the invalidation of transfers working a preference, though valid under state law.

Such action does not indicate a disregard of the property rights created by state law. The state law still establishes the norm to which Congress must substantially adhere; a serious departure from this norm, i.e., from the quality of the property rights created by the state law, has led to condemnation of the federal action as constituting a deprivation of property without due process.

> Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law. Most property rights are so created and protected. But if Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights, provided the limitations of the due process clause are observed. 204 U.S. at 517-518.

Vanston Bondholders Protective Committee v Green, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162 (1946) again recognized the rule to be that "What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law." 329 U.S. at 161. What is important about *Vanston* is this Court took the position (at least with regard to following state law or

federal law in the application of interest) *"we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act."* 329 U.S. at 161.

Butner is the touchstone case relied upon to defend the proposition that state law (non-bankruptcy law) is to be followed in the issue before us. Two points gleaned from that case govern our position here:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.' 440 U.S. at 54.
>
> But undefined considerations of equity provide no basis for adoption of a uniform federal rule affording mortgagees an automatic interest in the rents as soon as the mortgagor is declared bankrupt. 440 U.S. at 55.
>
> What does follow is that the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensured. This is the majority view, which we adopt today. 44 U.S. at 56.

JWH, is arguing this case from the standpoint of a mortgagee that forecloses properties under default which

are the homestead of the mortgagors. From this standpoint, it is clear Congress desired to afford special treatment and protections to secured creditors who have a lien upon the principal residence of the debtor. This is clear from the statute, 11 USCS § 1322(b)(2), and from the latest decisions of this court in both *Rake* and *Nobelman*. Yet, both of those cases came before this Court from a refusal of the inferior courts to pay attention to text and the compulsion to fashion a federal rule in opposition to established state substantive law.

There is no basis for the fashioning of a federal rule that upsets validly conducted state foreclosure proceedings and validly conducted state and county tax sales. All states have in place uniform fraudulent conveyance or transfer acts. All states in which JWH does business have in place homestead exemption statutes which place the debtors' homes exempt from general unsecured creditors. In no instance can the foreclosure or the tax sale of a homestead be deemed to have injured unsecured creditors.

THIS COURT CANNOT INFER PREEMPTION OF STATE FORECLOSURE LAW AND STATE AND COUNTY TAX SALE LAW.

The tension arises between the federal bankruptcy Code and substantive state law. It can be argued, without real support, the Bankruptcy Code pre-empts state law on this subject. The Supremacy Clause "invalidates any state law that contradicts or interferes with an Act of Congress." *Missouri-Kansas-Texas Ry. Co v States*, 712 P.2d 40, 47 (Okla. 1985). A state law is invalid, *inter alia*, to the extent that it "actually conflicts with a . . . federal statute." *Ray v Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct.

988, 994, 55 L.Ed.2d 179 (1978), or when it "stands as an obstacle to the accomplishment and execution of the full purpose of Congress." *Hillsborough County v Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985), quoting *Hines v Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941).

Examination of *Cipollone v Liggett Group, Inc.*, 112 S.Ct. 2608, 2624-2626 (1992) reveals certain applicable principles:

> Our precedents do not allow us to infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.
>
> We resort to principles of implied pre-emption – that is, inquiring whether Congress has occupied a particular filed with the intent to supplant state law or whether state law actually conflicts with federal law, see *English v General Electric, Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990) – only when Congress has been silent with respect to pre-emption.
>
> Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.
>
> We are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect.
>
> Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to

assure full federal authority, completely displacing the States.

CONCLUSION

This Court should adopt the construction Congress has not pre-empted the field of state foreclosure law or the field of state tax sale law.

The rationale of the Ninth Circuit in the case at bar is the better approach in absence of clear, unambiguous evidence to the effect that Congress did not infer a scope of pre-emption such as to allow a bankruptcy court to ignore state substantive law.

To maintain the integrity of mortgage foreclosure law, this court should affirm the Ninth Circuit.

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APPENDIX

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a

transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believe that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of

the case, such transfer is made immediately before the date of the filing of the petition.

Rule 37.3 Consent to Filing
Amicus Curiae Brief

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July 1, 1993

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Re: BFP v Resolution Trust Corp. No. 92-1370

Dear Mr. Johnson:

As requested in your letter, I hereby consent to the filing of an *amicus curiae* brief in the above captioned case.

Very Truly Yours,

/s/ Ray Woolsey
Ray Woolsey

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June 30, 1993

Lawrence A. G. Johnson
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BY FACSIMILE
AND U.S. MAIL

Re: BFP v. RTC
United States Supreme Court No. 92-1370

Dear Mr. Johnson:

In response to your letter of June 25, 1993, my clients Paul Osborne, et al., Repondents/Appellees in the pending appeal, hereby consent to your client, Jim Walter Homes, Inc., filing an amicus brief in the above-captioned case. For your information, the Petitioner's/Appellant's brief is due July 8, 1993.

Please call me if you need anything else or have any questions. Thank you for your interest and assistance.

Very truly yours,

/s/ Michael R. Sment
MICHAEL R. SMENT

MRS:sat

(SEAL)

U. S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

June 29, 1993

Lawrence A.G. Johnson, Esquire
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2535 East 21st Street
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Re: BFP v. Resolution Trust Corp., No. 92-1370

Dear Mr. Johnson:

As requested in your letter of June 25, 1993, I hereby consent to the filing of an *amicus curiae* brief in the above-captioned case.

Sincerely,

/s/ Drew S. Days, III/as
Drew S. Days, III
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

No. 92-1370

In The

Supreme Court of the United States

October Term, 1993

BFP, A Partnership,

Petitioner,

v.

THE RESOLUTION TRUST CORPORATION As Receiver for IMPERIAL FEDERAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AND THE AMERICAN COLLEGE OF REAL ESTATE LAWYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Was the Ninth Circuit's holding that the "reasonably equivalent value" standard set forth in Section 548 of the Bankruptcy Code was satisfied by the price received at a noncollusive, regularly conducted foreclosure sale a permissible interpretation of Section 548?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Council of Life Insurance (the "Council") is a nonprofit voluntary trade association, the membership of which totals 634 legal reserve life insurance companies doing business throughout the United States. The member companies of the Council account for 89.9 percent of the legal reserve life insurance in force in this country and afford protection to approximately 140 million insureds. At the end of 1992, life insurance companies held $247 billion of long-term debt secured by mortgages on real property in the United States, which represented 15 percent of the total assets held by life insurance companies in that year.[2] A reversal of the decision below would have a serious adverse effect on these mortgage investments. On the other hand, life insurance companies have billions of dollars invested in unsecured corporate obligations that would be benefitted by a reversal of the decision below. Therefore, the Council is in a unique position to advise as to the proper resolution of the issue now before this Court.

The American College of Real Estate Lawyers ("ACREL") is a nonprofit corporation, organized on April 28, 1980, for the purpose of, *inter alia*, gathering together lawyers "to improve and reform real estate law and practice." (ACREL Articles of Incorporation at 2). ACREL's membership consists of approximately 800 attorneys from nearly every state and the District of Columbia who have concentrated their practice in real estate law for a period of ten years or more, and law school professors specializing in the field of real estate law. In addition, members elected to ACREL must have demonstrated a willingness to devote time to improving real property law through writing, teaching or participation in

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[1] Amici have obtained the permission of both parties in this case to file this brief. Written evidence of such permission is being submitted concurrently herewith.

[2] American Council of Life Insurance, 1993 Life Insurance Fact Book Update (ACLI, Washington, D.C. 1993).

professional association activities. ACREL's membership represents the entire spectrum of the real estate industry including borrowers, lenders, investors and developers. ACREL is therefore in a position to offer an unbiased opinion as to the proper resolution of the issue now before this Court.

This brief supports the position of the Respondent in this case. Due to the background of the Amici and their experience as lenders and as counsel to lenders, borrowers, and prospective purchasers at foreclosure sales, they are in a unique position to offer their expertise to this Court concerning the serious adverse impact that a reversal of the decision below would have on real estate financing.

SUMMARY OF ARGUMENT

Congress did not define the phrase "reasonably equivalent value" contained in Section 548 of the Bankruptcy Code. The Ninth Circuit's holding below in *BFP v. Imperial Savings & Loan Association*, 974 F.2d 1144 (9th Cir. 1992) – which construed the "reasonbly equivalent value" standard to be satisfied by the price received at a noncollusive, regularly conducted foreclosure sale – is the only interpretation of these words that makes sense in light of the history and purpose of the statute.

A review of the history of Section 548 demonstrates that Congress never intended that it be used to attack noncollusive, regularly conducted foreclosure sales, but rather adopted into the Code state fraudulent conveyance law as it existed at the time of enactment. State fraudulent transfer law was and remains consistent with state foreclosure law in not permitting an attack on a foreclosure sale based upon inadequacy of price where the sale was free from collusion and inequitable conduct and conducted in accordance with the requirements of state law. The Fifth Circuit decision in *Durrett v. Washington National Insurance Company*, 621 F.2d 201 (5th Cir. 1980) went beyond the scope of Section 548, constituted an aberration from the prior law of fraudulent conveyances, and

represented an unjustified interference with carefully developed foreclosure requirements of state law.

Adoption of any other interpretation of the phrase "reasonably equivalent value" by this Court can only have a severe and negative impact on the real estate financing market. It would result in the tightening of the availability of credit, rising interest rates, and under-utilization of property. Accordingly, the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I.

THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT THE PRICE RECEIVED AT A NONCOLLUSIVE, REGULARLY CONDUCTED FORECLOSURE SALE SHOULD ESTABLISH REASONABLY EQUIVALENT VALUE UNDER 11 U.S.C. § 548(a)(2)(A)

A. Congress Did Not Expressly Provide For A Method Of Determining "Reasonably Equivalent Value" Pursuant To 11 U.S.C. § 548(a)(2)(A) And The Ninth Circuit's Holding Is A Permissible Interpretation Of That Phrase

Under Section 548 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), a transfer of a debtor's interest in property may not be avoided unless the debtor "received less than a reasonably equivalent value in exchange for such transfer. . . . " 11 U.S.C. § 548(a)(2)(A). However, the phrase "reasonably equivalent value" is not defined in the Bankruptcy Code. Although it is axiomatic that the starting point of statutory interpretation is the language of the statute itself, where the statute does not define its terms, the courts must interpret those terms based on the history and overall purpose of the statute. Accordingly, since Section 548 of the Bankruptcy Code does not supply a definition for the

phrase "reasonably equivalent value," the Petitioner and Petitioner's Amici's[3] insistence that the clear language of Section 548 requires reversal of the decision below is misplaced. A review of the history and purpose of Section 548 of the Bankruptcy Code indicates that Congress never contemplated that transfers of a debtor's interest in property by means of a noncollusive foreclosure sale, conducted in accordance with procedures long established by state law, could be collaterally attacked in bankruptcy because of a claimed inadequacy of price. Rather, Congress intended to incorporate the meaning of the phrase "reasonably equivalent value" as it was understood under state law. The Ninth Circuit's decision below comports with this interpretation.

B. Congress Did Not Intend Section 548 of the Bankruptcy Code To Apply To Noncollusive, Regularly Conducted Foreclosure Sales

1. Historical Basis For Section 548 Of The Bankruptcy Code

Section 548 of the Bankruptcy Code is the most recent codification of fraudulent-transfer laws, the roots of which trace back over 2,000 years to early Roman law. A brief review of that history will help explain the purpose of Section 548.

a. Roman Law

Under Roman law, a defrauded creditor could avoid a fraudulent conveyance by an insolvent debtor by use of a tort action known as a "Paulian Action." Max Radin, *Handbook of Roman Law* 153 (1927). Where the debtor had deliberately stripped himself of property while insolvent, suit could be brought against both the debtor and a *mala fide* purchaser

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[3] "Petitioner's Amici Brief" refers to the brief submitted by Frank Allen, Levander and Elnora McKeever, the Consumer Education and Protective Association, The Consumers League of New Jersey, and Chapter 13 Trustee Edward Sparkman as Amici Curiae in support of Petitioner. "Petitioner's Amici" refers to the proponents of the Petitioner's Amici Brief.

from the debtor as an accessory to the fraud. *Id.* However, such an action was conditioned on (1) the insolvency of the debtor, and (2) reckless disregard for the creditor's rights. *Id.* at 154.

b. English Law

The first Anglo-American fraudulent-conveyance laws were created in response to a perceived abuse of "sanctuary laws" which allowed debtors to transfer their property collusively and then seek sanctuary in various privileged places. 3 William Holdsworth, *A History of English Law* 305-06 (5th ed. 1966). In response to this abuse, Parliament enacted a statute permitting creditors to execute on land and chattels collusively conveyed, 50 Ed. III, c. 6 (1376), and it later passed a statute that avoided gifts of chattels made in trust with intent to defraud creditors, 3 Hen. VII, c. 4 (1476). Thus, from their inception, Anglo-American fraudulent-conveyance laws were enacted to curb the abuses of deliberately fraudulent debtors.

c. The Statute of 13 Elizabeth

The Statute of 13 Elizabeth, generally considered the foundation of modern fraudulent-transfer law, was enacted in 1570 and states, in pertinent part, that "covinous and fraudulent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments And Executions . . . devised and contrived of Malice, Fraud, Covin, Collusion Or Guile, to the End, Purpose and Intent, to delay, hinder or defraud Creditors and others . . . shall be . . . utterly void, frustrate and of none Effect. . . . " 13 Eliz., c. 5 (1570). As can be seen from the language of the statute, a showing of intent to defraud was required. However, due to the fact that people do not normally make public their intent to commit fraud, it became necessary to look to the facts surrounding the transfer to uncover such intent. As a result, over time, the statute was judicially expanded to presume that certain acts or circumstances were in themselves indicative of the necessary fraudulent intent. H. W. May and W. Douglas Edwards, *The Law of Fraudulent and*

Voluntary Conveyances 4-5 (3d ed. 1908). Thus, even if a creditor could not show actual intent to defraud, the creditor could still meet this burden by showing the requisite circumstances or "badges of fraud" to create a presumption of actual intent to defraud. Nevertheless, proof of actual intent to defraud either by direct or circumstantial evidence was still necessary if relief was to be afforded under the statute. Accordingly, the purpose of the "badges of fraud" was not to eliminate the requirement of actual intent to defraud, but to allow proof of such intent by indirect means. *See Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601). This English body of law formed the foundation of American fraudulent-conveyance law.

d. The Uniform Fraudulent Conveyance Act

In response to confusion resulting from inconsistent applications of the badges and presumptions of fraud, and from the fact that creditors were attempting to use badges of fraud to characterize all conveyances that had an adverse effect on creditors as fraudulent, the National Conference of Commissioners on Uniform State Laws approved the Uniform Fraudulent Conveyance Act (the "UFCA") in 1918. The UFCA eliminated the badges of fraud and instead grouped some of the badges of fraud into constructive frauds for which no showing of intent was required.[4] However, the intent of the UFCA was not to change the law, but to clarify it and produce the same substantive results as the Statute of 13 Elizabeth. Thus, the prefatory note to the UFCA states: "In most states, the bill if enacted will not so much change the law as clearly define what heretofore has been indefinite." UFCA, Commissioners' Prefatory Note, 7A U.L.A. 427-28 (1985). Indeed, a leading scholar of fraudulent-conveyance law stated that "[the UFCA] is a modernized statute of Elizabeth and nothing

[4] It was one of these constructive frauds that was later incorporated into American bankruptcy law by the Chandler Act of 1938 that forms the basis for challenges to noncollusive, regularly conducted foreclosure sales at issue in this case.

else." James A. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv. L. Rev. 404, 405 (1933). Thus, although constructive fraud was substituted for the presumptions and badges of fraud, there was no change in the purpose of the law – to ferret out those transactions that were intended to hinder, delay or defraud creditors.

e. Early American Bankruptcy Law

Starting with the first bankruptcy law of the United States enacted in 1800, every American bankruptcy act has included a fraudulent conveyance provision. In the Bankruptcy Act of 1898, Congress adopted, with only minor changes, the language and law of the Statute of 13 Elizabeth in Section 67d. Bankruptcy Act of July 1, 1898, ch. 541, § 67d, 30 Stat. 544 (*repealed* 1978) (the "Bankruptcy Act"). In 1938, the bankruptcy law was amended by the Chandler Act, ch. 575, 52 Stat. 9 (1938) (*repealed* 1979) (the "Chandler Act") which, but for minor changes, incorporated the provisions of the UFCA.

f. Section 548 of the Bankruptcy Code

In 1978, Congress once again overhauled the Bankruptcy Act. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 101-151326, 92 Stat. 2549 (1978). In the 1978 revision, Section 548 replaced Section 67d with only minor changes. The principal changes were: (1) the reordering of the listing of fraudulent conveyances; (2) the substitution of "reasonably equivalent value" for "fair consideration;" and (3) the removal of the requirement that the purchaser acquire the property in "good faith." Because so few changes were made to the substance of Section 67d, there is very little commentary on Section 548 and absolutely no indication that Congress intended radical revisions to the federal law of fraudulent conveyances. Section 548 is thus a direct successor to the Uniform Fraudulent Conveyance Act, the Statute of 13 Elizabeth and the prior English and Roman laws concerning fraudulent conveyances. Over the course of centuries, the difficult-to-prove subjective test necessary to establish a

fraudulent conveyance has evolved into the wholly objective tests currently found in the UFCA and Section 548. However, the main purpose of fraudulent-conveyance laws has remained constant: prevention of inequitable transfers that would divert assets from the debtor's creditors. A noncollusive, regularly conducted foreclosure sale does not violate this policy.

2. For More Than 400 Years, Fraudulent-Conveyance Laws Have Not Been Applied To Noncollusive, Properly Conducted Foreclosure Sales

Foreclosure sales have never been exempt from subsequent legal challenges. Failure to comply with statutory requirements applicable to foreclosure sales or fraudulent conduct designed to chill bidding at a sale are generally grounds under state foreclosure law to set aside a foreclosure sale. *See* Nelson and Whitman, *Real Estate Finance Law* § 7.11 (2d ed. 1985). Moreover, it is clear that fraudulent-conveyance laws can be used to invalidate a transfer of the debtor's property at a mortgage sale initiated by a creditor if collusion between the debtor and the creditor can be shown. 1 Dewitt C. Moore, *A Treatise on Fraudulent Conveyances and Creditors' Remedies at Law and in Equity* § 13 at 50 (1908); 1 Garrard Glenn, *Fraudulent Conveyances and Preferences* § 214a, at 367 (2d ed. 1940); Orlando F. Bump, *A Treatise Upon Conveyances Made by Debtors to Defraud Creditors* § 237, at 276-77 (James M. Gray ed., 4th ed. 1896). Invalidation of such unfair foreclosure sales is consistent with the policy of fraudulent-conveyance laws and consequently is not surprising.

Equally unsurprising is that no reported case decided prior to *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) under English or American fraudulent-conveyance law had ever invalidated a noncollusive, regularly conducted foreclosure sale of the debtor's property.[5] Importantly,

[5] *See* Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 Cardozo L. Rev. 581, 586 (1987);

even when a foreclosure action and sale are conducted under the applicable state law and procedural rules and are free of any collusive or fraudulent conduct, state mortgage law provides an additional protection for the debtor and the debtor's creditors. Under American mortgage law, it has always been clear that a foreclosure sale could be set aside if the inadequacy of price is so great as to shock the conscience of the court. *See* 2 Charles H. Wiltsie, *A Treatise On the Law and Practice of Real Property Mortgage Foreclosure* § 647, at 1049-51 (5th ed. 1939). Against this background of state mortgage laws and fraudulent-conveyance laws, Congress incorporated fraudulent-conveyance law into the bankruptcy law. The *Durrett* court ignored 400 years of fraudulent-conveyance law and held that under Section 548 of the Bankruptcy Code a noncollusive, regularly conducted foreclosure sale could be set aside because of the inadequacy of the price obtained at the sale. Thus, a new federal measure of adequacy of price was created by the *Durrett* court without regard to the applicable mortgage doctrine that a foreclosure sale could only be set aside if the price paid is so inadequate as to shock the conscience of the Court. Thus, the decision of the Fifth Circuit in *Durrett* should be seen as an aberration from both the precedent and policy of the law of fraudulent conveyances which has developed as part of the Anglo-American legal system for over 400 years and from American bankruptcy law. The *Durrett* court's failure to cite even one case in which a noncollusive, regularly conducted mortgage foreclosure sale was invalidated as a fraudulent conveyance demonstrates that decision's abrupt departure from well-settled principles of fraudulent-conveyance law. Judge Clark, dissenting in *Abramson v. Lakewood Bank and Trust Co.*, 647 F.2d 547 (5th Cir.

but see Frank R. Kennedy *Involuntary Fraudulent Transfers*, 9 Cardozo L. Rev. 531, 532 (1987) ("the '*Durrett* doctrine' is not so novel. . . . "). However, all of the cases cited by Professor Kennedy in support of this statement involved facts consistent with a determination of actual fraud. None involved noncollusive, regularly conducted foreclosure sales until the *Durrett* case was decided. Zinman, 9 Cardozo L. Rev. at 584 n.19 (1987).

1981) (Clark, J., dissenting), *cert. denied*, 454 U.S. 1164 (1982), recognized this flaw in the *Durrett* holding:

> It is interesting to me that *Durrett* is the first case to treat this problem – after 90 years of bankruptcy law and mortgages of a time greater than the memory of man. It again establishes what an imaginative lawyer can do when he adds persuasion.

Id. at 550.[6]

3. The Legislative History Of Section 548 And Its Predecessors Does Not Demonstrate Any Intention To Depart Radically From Over 400 Years Of Fraudulent-Conveyance Law

An examination of the legislative history underlying Section 548 of the Bankruptcy Code, as well as its predecessors, Bankruptcy Act Sections 67d and 67e, shows that at no time did Congress ever intend radically to change existing fraudulent-conveyance law.

The Bankruptcy Act of 1898, as it existed prior to the Chandler Act, contained a virtual restatement of the Statute of 13 Elizabeth.[7] Since the Statute of 13 Elizabeth had been clarified by the UFCA in many jurisdictions, Congress amended the Bankruptcy Act in 1938 with the enactment of the Chandler Act to reflect the law of fraudulent conveyances as codified in the UFCA:

> We have condensed the provisions of the Uniform Fraudulent Conveyance Act, *retaining its substance*, and as far as possible, its language. Analysis of H.R. 12339, 74th Cong., 2d Sess. 214 (1936)

[6] During substantially the same period, if not longer, many states have had on their books a version of the UFCA and a complementary body of law regulating foreclosures.

[7] The first sentence of Bankruptcy Act Section 67e provided:

> All conveyances, transfers, assignments, or encumbrances of his property. . . . made or given by a person . . . with the intent and purpose on his part to hinder, delay, or defraud his creditors, . . . shall be void as against the creditors of such debtor. . . . Bankruptcy Act of July 1, 1898, ch. 541, § 67e, 30 Stat. 544.

> (emphasis added). *Cited in* 4 *Collier on Bankruptcy* ¶ 67.29[1], at 475 n.6 (James W. Moore et al. eds., 14th ed. 1978).
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> . . .
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> The UFCA was used by the drafters of the Chandler Act because it was considered to be declaratory of the better decisions of American state courts construing the Statute of Elizabeth and because, as it was believed, it would promote uniformity under the Bankruptcy Act with respect to the subject of fraudulent conveyances. 4 Robert D'Agastino et al., *Collier on Bankruptcy* ¶ 548.01, at 548-15 (Lawrence P. King et al. eds., 15th ed. 1993).

To summarize, the Bankruptcy Act of 1898 essentially reenacted the Statute of 13 Elizabeth; the UFCA clarified the Statute of 13 Elizabeth but did not intend any radical departure from it; and the Chandler Act codified the UFCA in American bankruptcy law. Throughout this process, there was never any indication that a radical departure from the prior precedent or policy of fraudulent-conveyance law was intended, or that regularly conducted foreclosure sales, in the absence of some inequitable conduct, were to be included in the coverage of the law. Indeed, when the Bankruptcy Act of 1898 and the Chandler Act were passed, it was settled American law that a foreclosure sale could not be set aside for mere inadequacy of price unless the inadequacy was so great as to shock the conscience of the Court. *Graffam v. Burgess*, 117 U.S. 180, 191-92 (1885); *See* 2 Wiltsie, *supra* at 1049-51. Congress presumably knew what the law was at the time it passed the Bankruptcy Act and the Chandler Act and presumably would have made it clear if it had intended a radical departure from that law. However, as discussed above, not only did Congress not intend to change the law drastically, it specifically intended to restate and clarify existing law.

Similarly, in 1978 when the Bankruptcy Code was enacted, Congress presumably was cognizant of the prior history of fraudulent-conveyance law and presumably was aware of the fact that no case under English or American fraudulent-conveyance law had invalidated a noncollusive,

regularly conducted foreclosure sale. Thus, if the provisions of Section 548 of the Bankruptcy Code were intended to result in a radical change from the past, one would expect that Congress would have made that intention clear. However, as previously discussed, the language of Section 548 and its legislative history evidence no such distinguishing language or intent to make such a radical change.

4. By Incorporating State Fraudulent-Transfer Law Into The Bankruptcy Act And The Bankruptcy Code, Congress Adopted The Common State Law Understanding Of The Meaning Of "Fair Consideration" And "Reasonably Equivalent Value"

a. State Foreclosure Law, Designed To Balance The Interests Of Borrower And Lender, Permitted Setting Aside Of Foreclosure Sales Only For Price And Fairness Considerations Akin To Intentional Fraud

From the inception of mortgage foreclosure law to the present day, courts and legislatures have wrestled with the problem of balancing the interests of mortgage lenders on the one hand and mortgage borrowers and their creditors on the other. *See* Steven Wechsler, *Through the Looking Glass: Foreclosure Sale As De Facto Strict Foreclosure – An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 Cornell L. Rev. 850, 855 (1985), and sources cited therein. The "equity of redemption" was developed to protect the borrower who missed payment of the mortgage on "law day;" the foreclosure process was designed to protect the mortgagee by allowing the equity court to cut off, or foreclose, the equity of redemption; the foreclosure sale was created to safeguard the borrower in a variety of ways, including providing a forum for open bidding as a means of bringing the best foreclosure sale price possible given the forced-sale nature of

the process;[8] legislatures intervened to aid the borrower with additional protective devices, including restricting or limiting the ability of the lender to obtain deficiency judgments, providing the borrower and junior creditors with rights of redemption after the sale and establishing court confirmation requirements; and the courts have been willing to set aside a foreclosure sale if it were found to be collusive or in bad faith shown by a gross price inadequacy and other evidence of fraud. *Id.* at 855-865. Because this state foreclosure law was designed by the legislatures and interpreted by the courts to balance the relative interests of borrowers and lenders, state courts refused to set aside a foreclosure sale because of claimed inadequacy of price absent circumstances amounting to intentional fraud. *See* 2 Wiltsie, *supra* at 1049-51.

When the Bankruptcy Act of 1898 and the Chandler Act were enacted, it was settled law that a foreclosure sale would not be set aside by the courts based on a claimed inadequacy of price unless the price inadequacy was so great as to shock the conscience of the court or unless additional circumstances showed that the sale was unfair. Indeed this Court in *Graffam v. Burgess*, 117 U.S. 180, 191 (1885), after reviewing existing mortgage foreclosure cases, concluded that foreclosure sales might be set aside only if:

> the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void or the party injured will be permitted to redeem the property sold.

Thus, when the Bankruptcy Act of 1898 was enacted, it was clear that unless the conduct of the foreclosure was so

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[8] It is ironic that the foreclosure sale process, designed to protect the borrower by providing the best possible price, is the process that is being described as fraudulent and being used to attempt to overturn legitimate, noncollusive sales conducted under state law.

inequitable as to be tantamount to intentional fraud or collusion, courts would not set aside the foreclosure sale based merely on an allegation of inadequacy of price. State courts to this day follow this rule, which recognizes the price paid at a noncollusive foreclosure sale pursuant to the provisions of state law as constituting reasonably equivalent value. Only failure to comply with state foreclosure law, gross disparity of price, lack of good faith, fraud or other inequitable conduct would permit a state court to invalidate a foreclosure sale.

b. State Fraudulent-Transfer Law Has Always Been Wholly Consistent With State Foreclosure Law, Under Which Noncollusive Mortgage Foreclosure Sales Conducted Pursuant To State Law Were Always Considered To Meet The Requirements Of Reasonably Equivalent Value

The mortgage foreclosure law and equity jurisprudence of the respective states, not the fraudulent-conveyance laws of those states, determines the validity of a noncollusive foreclosure sale. State courts interpreting the UFCA and other state fraudulent-transfer law recognized the meaning attributed to "fair consideration" or "reasonably equivalent value" in their confirmation of foreclosure sales and never applied fraudulent-transfer law to set aside noncollusive, regularly conducted foreclosure sales as fraudulent transfers.[9] This made sense because, as discussed above, fraudulent-transfer law, including the use of badges and presumptions of fraud and the development of constructive frauds, was always intended as a means of ferreting out transactions designed to hinder, delay and defraud creditors. If a foreclosure sale were noncollusive, it would be, by definition, nonfraudulent and not within the mischief[10] for which the statute was written.

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[9] *See supra* note 5.

[10] Lord Coke's "mischief rule" for judicial interpretation of statutes is articulated in Heydon's Case, 76 Eng. Rep. 637 (Exchequer 1584). The case is excerpted and its principle discussed in Henry M. Hart, Jr. and Albert M. Sacks, *The*

State law has been so clear that noncollusive foreclosure sales conducted in accordance with state law are presumed to be for a reasonably equivalent value, that after the Fifth Circuit in *Durrett* attempted to turn existing law on its head by applying the Bankruptcy Act version of the UFCA to a noncollusive, regularly conducted foreclosure sale, the National Conference of Commissioners on Uniform State Laws specifically rejected *Durrett* in the Uniform Fraudulent Transfer Act (the Commissioner's revision of the UFCA), Unif. Fraudulent Transfer Act § 3(b), 7A U.L.A. 643 (1984), as an incorrect interpretation of both the law and the definition of reasonably equivalent value as it relates to noncollusive mortgage foreclosure sales.[11] *Id.* § 3, Comment 5.

c. By Incorporating State Fraudulent-Transfer Law Into The Bankruptcy Act And The Bankruptcy Code, Congress Adopted The State Law As It Was Interpreted At The Time Of Enactment

As pointed out by this Court, Congress does not write on a clean slate. *Dewsnup v. Timm*, ___ U.S. ___, 112 S. Ct. 773, 779, 116 L. Ed. 2d 903 (1992). In enacting the fraudulent transfer provisions of the Bankruptcy Act and later in the Bankruptcy Code, Congress did not write new law, but on the contrary clearly indicated its intent to incorporate state fraudulent-transfer law as it existed at the times of enactment of those laws. Reversal of the decision below would, in effect, expose every foreclosure sale to subsequent attack in a case under the Bankruptcy Code merely because, with hindsight,

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Legal Process: Basic Problems In The Making And Application Of Law, 1144, 1414-15 (Tentative Edition, 1958).

[11] Indeed, the National Bankruptcy Conference has proposed amending the Bankruptcy Code to overrule *Durrett*, Symposium, Bankruptcy Reform Circa 1993, ALI-ABA Conference (June 10-12, 1993). (The Conference concluded that a regularly conducted, noncollusive foreclosure sale should not be subject to attack under 11 U.S.C. § 548 and any problem of inadequacy of price at foreclosure sales should be remedied by amending the foreclosure process to ensure foreclosure sales are conducted in a commercially reasonable manner.)

the bankruptcy court, applying some non-statutory measure, finds the purchase price to be too low. This result would trample on state law without any evidence that Congress intended to pre-empt established state law.

5. The 1984 Amendments To The Bankruptcy Code Had No Effect On The Meaning Of Reasonably Equivalent Value Or The Application Of Fraudulent-Transfer Law To Noncollusive, Regularly Conducted Foreclosure Sales

In 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333, July 10, 1984 (the "1984 Amendments"). These amendments contained two clarifying amendments – adding "foreclosure of the debtor's equity of redemption" to the definition of transfers in 11 U.S.C. § 101(54), and making it clear in 11 U.S.C. § 548(a) that the fraudulent-transfer provisions applied to involuntary as well as voluntary transfers (hereinafter collectively referred to as the "Clarifying Amendments"). These Clarifying Amendments have been used by the Petitioner as a basis for arguing that they represent an intent by Congress to "change the rule" announced by the Bankruptcy Appellate Panel in *Madrid v. Lawyers Title Ins. Corp.*, 21 B.R. 424 (9th Cir. BAP 1982), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984), which held, as the Ninth Circuit has held in *BFP*, that the price received at a noncollusive, regularly conducted foreclosure sale satisfies the "reasonably equivalent value" standard of Section 548 of the Bankruptcy Code. As will be analyzed below, there is absolutely no basis for such a contention.[12]

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[12] Whatever the interpretation of the Clarifying Amendments may be, however, they have no relevance to the instant case. The Ninth Circuit decision is not inconsistent with them. Indeed, in order to reach the conclusion that a noncollusive, regularly conducted foreclosure sale should be deemed to be for a reasonably equivalent value under 11 U.S.C. § 548, the Ninth Circuit had to conclude that the foreclosure sale was a transfer and that Section 548 applied to involuntary transfers. At no time did the Ninth Circuit even imply an interpretation at variance with these amendments.

a. The 1984 Amendments Were Not Intended To Overrule The Decision In *Madrid* Or To Codify The Decision in *Durrett*

Petitioner's contention that the Clarifying Amendments were intended to overrule the Bankruptcy Appellate Panel's decision in *Madrid* is belied by the language of the Clarifying Amendments themselves, as there is absolutely no language in the Clarifying Amendments regarding the construction of the phrase "reasonably equivalent value." Surely Congress was aware of this approach to the resolution of the *Durrett* problem. However, the Clarifying Amendments do not in any way deal with the issue of defining "reasonably equivalent value." If Congress intended to do more than make clear that foreclosure sales are transfers and that Section 548 applies to involuntary transfers, and intended to legislate the reasonably equivalent value could not be presumed to be the price paid at a noncollusive foreclosure sale, it could have specifically done so. Since Congress did not do so, the Petitioner's contention that the Clarifying Amendments were designed to overrule the Bankruptcy Appellate Panel's decision in *Madrid* is wholly misplaced.

b. The Clarifying Amendments Were Part Of A Package Of Anti-*Durrett* Legislation And Were Not Intended To Support The *Durrett* Concept In Any Way. The Retention Of The Clarifying Amendments When The Matters Relating To *Durrett* Were Ordered Expunged From The Draft Was Purely A Scrivener's Error

To the extent that it is necessary to look to the legislative history of the Clarifying Amendments, it becomes even clearer that they were not intended to overrule *Madrid*. Rather, the history of the Clarifying Amendments makes it clear that they were only intended to ensure that intentionally fraudulent foreclosure sales did not escape the reach of Section 548, and nothing more.

As originally introduced in Congress, the Clarifying Amendments were part of a package of legislation contained in the Senate version of the 1984 Amendments designed to overrule the *Durrett* decision. Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary Nonfraudulent Transfers,* 9 Cardozo L. Rev. 581, 587 (1987). The main provision dealing with *Durrett* would have codified into federal law the approach taken by the Bankruptcy Appellate Panel in *Madrid* (now incorporated into the language of the Uniform Fraudulent Transfer Act) making it clear that the price received at a noncollusive, regularly conducted foreclosure sale would constitute reasonably equivalent value. *Id.* With *Durrett* rejected, the drafters decided to deal with two possible arguments: (1) that foreclosure sales were not transfers[13] or (2) that Section 548 did not apply to involuntary transfers.[14] If either of these two arguments were generally accepted, *collusive* foreclosure sales could escape the reach of 11 U.S.C. § 548. Thus, the Clarifying Amendments were merely intended to make clear that collusive foreclosure sales were within the reach of Section 548.[15]

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[13] This concern is illustrated by a law review article by Messrs. Coppel & Kann, Lawrence D. Coppel and Lewis A. Kann, *Defanging Durrett: The Established Law of "Transfer,"* 100 Banking L. J. 676 (1983) in which the authors argued that foreclosures were not transfers for fraudulent transfer purposes.

[14] This concern is illustrated by Judge Farris' concurring opinion in the Ninth Circuit's decision in *Madrid* wherein he argued that Section 548 required voluntary action by the debtor. *Madrid v. Lawyers' Title Ins. Corp. (In re Madrid),* 725 F.2d 1197, 1203-04 (9th Cir. 1984) (Farris, J., *concurring*), *cert. denied,* 469 U.S. 833 (1984).

[15] This view is even supported by *Durrett* sympathizers. *See* Frank R. Kennedy, *Involuntary Fraudulent Transfers,* 9 Cardozo L. Rev. 531, 566 (1987) ("the 1984 Amendments 'did not purport to deal with the question of whether a noncollusive, regularly conducted foreclosure sale should be deemed to be for a reasonably equivalent value.' ")

c. The Enactment Of The Clarifying Amendments Was The Result Of A Scrivener's Error

If one looks further into the history of the enactment of the Clarifying Amendments, it becomes apparent that the Clarifying Amendments would not have been enacted but for a clerical mistake. During the debate on the 1984 Amendments, including the original anti-*Durrett* amendment, Senator Metzenbaum raised various objections to those amendments. Because of Senator Metzenbaum's objections, the short time available for debate on the floor and the necessity of passage of the 1984 Amendments to restructure the Bankruptcy Courts in light of the constitutional defects identified by this Court in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), Senator Thurmond acquiesced in Senator Metzenbaum's objection to the inclusion of the *Durrett* amendments and ordered deletion of "provisions relating to the . . . *Durrett* issue." 130 Cong. Rec. S7617 (daily ed. June 19, 1984). However, because of a scrivener's error,[16] only the major anti-*Durrett* amendment was deleted, and the Clarifying Amendments were inadvertently left in the bill when it was enacted. Clearly, from this background it is impossible to conclude, as the Petitioner argues, that "sections 101 and 548 were amended to change the rule announced" by the Bankruptcy Appellate Panel in *Madrid.*[17]

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[16] *Cf., Union Bank v. Wolas,* ___ U.S. ___, 112 S. Ct. 527, 534, 116 L. Ed. 2d 514, (1991) (Scalia J., concurring)

[17] These events are recounted in a colloquy between Senator Dole, the Chairman of the Subcommittee of the Senate Committee on the Judiciary responsible for bankruptcy legislation at the time of the passage of the 1984 Amendments, and Senator DeConcini, who was Chairman of that subcommittee when the Bankruptcy Code was enacted. The colloquy has not been directly relied upon in this brief because it has been attacked as "post-enactment" legislative history and it is believed that the outcome of a debate on that question is not necessary to the determination of the issues here presented. However, it should be borne in mind that the colloquy did not purport to modify clear language of the statute through post-enactment legislative history. It does not attempt to undo what was written in the statute, but rather to indicate that the language of the statute

C. "Reasonably Equivalent Value" Does Not Mean Fair Market Value In The Context Of A Foreclosure Sale

The Petitioner's Amici argue that the phrase "reasonably equivalent value" should be construed to mean "fair market value." (Petitioner's Amici Brief at 13-27.) As set forth below, this argument is not supported by the plain language of the statute and makes no practical sense in the context of the realities of a foreclosure sale.

The definition of "fair market value" typically used by appraisers when appraising a parcel of real property is as follows:

> Market Value – The highest price in terms of money which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus.
>
> Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: 1. buyer and seller are typically motivated 2. both parties are well informed or well advised, and each acting in what he considers his own best interest 3. a reasonable time is allowed for exposure in the open market 4. payment is made in cash or its equivalent 5. financing, if any, is on terms generally available in the community at the specified date and typical for the property type in its locale 6. the price represents a normal consideration for the property sold unaffected by special financing amounts and/or terms, services, fees, costs, or credits incurred in the transaction.

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should not be interpreted beyond its clear meaning, as has been urged by commentators supporting *Durrett*. *See* discussion in Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers, supra*, note 5, at 592-94, and references therein to Professor Kennedy's somewhat different conclusions.

Real Estate Appraisal Terminology 137 (Byrl N. Boyce ed., 1975)

Amici submit that the definition of "fair market value" typically employed by appraisers in determining the value of property in an arms-length negotiated sale does not make sense in the context of a foreclosure sale. The factors that go into an appraiser's definition of "fair market value," and therefore the factors that appraisers look at when evaluating property, do not exist in a foreclosure proceeding. The appraiser's definition assumes that the "buyer and seller are typically motivated," the "price is not affected by undue stimulus," the property may be sold at any time after exposure for a "reasonable period" on the "open market," and that "financing . . . on the terms generally available in the community" is available. On the other hand, the debtor and creditor in a foreclosure proceeding are operating under a pre-determined state methodology which is inherently different than a typical sale outside of foreclosure proceedings. The debtor is not a willing seller – the property is being sold regardless of (in fact, usually against) the debtor's wishes. In a foreclosure proceeding, the property is sold on a day set by the court or pursuant to statute and the buyer must generally pay the entire sale price in cash at closing. Foreclosure sales are thus made under circumstances that bear little resemblance or relevance to the appraisers' concept of "fair market value."[18]

Since the reasonably equivalent value to be arrived at under 11 U.S.C. § 548 is the value on the date of the foreclosure sale, to ignore the effect of the economic realities of that sale, results in comparing the bid at the sale, which

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[18] Even some of the courts that support the theory that noncollusive, regularly conducted foreclosure sales may be set aside based on inadequacy of price have determined that "reasonably equivalent value" does not mean fair market value, but rather, they conclude that "reasonably equivalent value" refers to the price that can be obtained at a forced sale. *See Barrett v. Commonwealth Federal Savings and Loan Association*, 939 F.2d 20 (3d Cir. 1991); *Hood v. Williams*, 92 B.R. 648 (Bankr. E.D. Va. 1988).

must be based on those economic realities, with a hypothetical value that does not consider those realities.[19] As state courts have always recognized, the test of the validity of a foreclosure sale is its noncollusiveness and its compliance with well-developed requirements of state law, not a hindsight determination by a court as to whether the price paid represented "fair market value."

The essence of the Ninth Circuit's construction of the reasonably equivalent value requirement to mean the *same* as the consideration received at a noncollusive, regularly conducted foreclosure sale, is to recognize that the best evidence of value is what bona fide buyers are willing to pay at a state authorized public sale rather than what an appraiser hypothesizes to a bankruptcy court as to what the value had been at the time of the transfer. The Ninth Circuit's approach is the only approach that makes sense when the economic realities of a foreclosure sale are considered and it harmonizes the law of foreclosures with the law of fraudulent conveyances without doing violence to the policies underlying either body of law.

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[19] This conclusion is not intended as support for the proposition that properties acquired by mortgagees at foreclosure sales are generally acquired for less than their market value. More often than not, mortgagees lose money on resale of foreclosed properties (see text at notes 26 and 27 *infra*). This is because properties with substantial equity value above the mortgage generally do not go to foreclosure. Borrowers normally are aware of their precarious financial condition long before default and there is normally a significant period of time before foreclosure is commenced and thereafter before sale of the property during which time the borrower can sell the property and preserve its equity. Most mortgagees sincerely believe that property will not go to foreclosure if the value exceeds the mortgage balance in any meaningful degree. *Wechsler, supra* at 853. Amici's concern, however, is that the imposition of an unrealistic requirement that fair market value be received in a forced foreclosure sale places every foreclosure purchaser at a severe disadvantage and encourages *Durrett* attacks on the foreclosure process.

II.

APPLICATION OF THE CONSTRUCTIVE FRAUD PROVISIONS TO NONCOLLUSIVE FORECLOSURE SALES CONDUCTED IN ACCORDANCE WITH STATE LAW MAKES NO SENSE WHEN PRACTICAL REALITIES ARE CONSIDERED

A. Adoption Of The *Durrett* Principle Would Have A Severe Adverse Effect On The Mortgage Market, The Availability Of Credit And The Effective Use Of Real Property

The *Durrett* principle, if adopted by this Court and thereby made applicable nationwide, can only have a severe and negative effect on the entire mortgage market. It would result in more cautious lending by institutions; the tightening up on the availability of credit; increased interest rate costs to borrowers; reduced bids at foreclosure sales to reflect the *Durrett* risk; and unreasonable under-utilization of property as purchasers at foreclosure sales wait out the applicable holding period[20] until the risk of a *Durrett* attack has passed.[21] These consequences can only be exacerbated by a

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[20] Section 548 of the Bankruptcy Code limits fraudulent transfer attack to the year prior to bankruptcy. However, a fraudulent transfer may also be attacked by the trustee by using state fraudulent-transfer law under § 544(b), which gives the trustee the rights of a creditor under state law against whom the lien is invalid. State fraudulent-transfer law is not conditioned on bankruptcy and thus, unless the state has adopted the Uniform Fraudulent Transfer Act, which rejects the *Durrett* principle as an incorrect interpretation of fraudulent-transfer law, the only limitation on its use in an attempt to attack mortgage foreclosures is the state statute of limitations for fraud. While state courts have not applied fraudulent-transfer law to noncollusive, regularly conducted foreclosure sales in the past, it is not clear that bankruptcy courts would feel constrained to adhere to that precedent if this Court were to reject the reasoning of the decision below and hold that "reasonably equivalent value" means something other than what had been previously understood. Thus in many states, foreclosed property could be exposed to a possible *Durrett* attack for many years.

[21] Provisions of the Bankruptcy Code designed to alleviate these risks are insufficient. For example, § 548(c) provides that upon setting aside a transfer, the transferee may have "a lien" to the extent of the amount bid at the foreclosure sale, and § 550(d) provides that the transferee may have "a lien" to the extent any

severe real estate recession, banking institutions struggling with insolvency, and major financial institutions shifting lending away from real estate mortgages.

The Amici support the thorough and well-reasoned analysis of the harmful and negative impact the *Durrett* principle will have on all participants in real estate transactions contained in the Amici brief of the Federal Home Loan Mortgage Corporation, the Mortgage Bankers Association of America, and the American Land Title Association.

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improvement it made increased the value of the property transferred. These remedies are available only if the court determines that the transferee acted in "good faith." Given decisions such as *In re Littleton*, 888 F.2d 90 (11th Cir. 1989) where the court questioned the good faith of any mortgagee bidding less than the court's hindsight determination of what value had been, these provisions do not give the mortgagee/purchaser much confidence. Furthermore, the lien for improvements is limited to the increase in the value of the property resulting from the improvements. This requires a subjective determination of the amount by which a particular expenditure increased property value and appears to ignore the fact that some repairs and other expenses are necessary merely to keep the property from depreciating further in value. No remedy is given to the foreclosure sale purchaser who sells the property after the sale to a good faith purchaser. In such a case, the remote purchaser is free from attack and the original foreclosure sale purchaser will be responsible for paying the difference between the bid price and what the court determines to have been the value of the property. *See In re Coleman*, 21 B.R. 832 (Bankr. S.D. Tex. 1982) where the foreclosed property had been sold by the transferee, after acquisition, for the same price bid at the foreclosure sale. The court nevertheless found the price was less than 28% of the value of the property and indicated that the mortgagee would be called upon to pay that difference if the remote purchaser had been in good faith.

B. Response To The Policy Arguments ~~Asserted~~ In The Petitioner's Amici Brief

1. The Shuchman[22] "Empirical Study" On The Effect Of The *Durrett* Rule Is Inaccurate And Represents An Attempt To Buttress Counter-Intuitive, Politically-Oriented Conclusions

The Petitioners, and especially the Petitioner's Amici, rely inordinately on the "empirical study" prepared by Professor Philip Shuchman, which purports to "prove" the dubious proposition that increased costs and risks to lenders associated with the *Durrett* rule have no effect on costs or availability of financing. This difficult task is attempted through the use of inconclusive and inaccurate "empirical" evidence.

a. Incorrect Theory And Analysis

The underlying premise of the Shuchman study is that lenders will decrease mortgage lending when the federal court covering a particular state adopts the *Durrett* principle, and contrariwise, lenders will increase lending activity when the governing court rejects *Durrett*. This premise is incorrect when applied to jurisdictions rejecting *Durrett*. Where a jurisdiction, not having previously adopted *Durrett*, rejects an

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[22] Philip Shuchman's "empirical" study, *Data on the Durrett Controversy*, 9 Cardozo L. Rev. 605 (1987) is cited throughout the Petitioner's Amici Brief to prove, *inter alia*, that general adoption of the *Durrett* principle will have no effect on the cost or availability of mortgage financing. The reasoning and accuracy of this study was strongly questioned in the very next issue of the same law review. Robert M. Zinman, *Durrett Data: Shucking the Husks from the Grain*, 9 Cardozo L. Rev. 1013 (1988). Yet the refutation is neither cited nor rebutted anywhere in the Petitioner's Amici Brief. Similarly, Professor Frank R. Kennedy's article, *Involuntary Fraudulent Transfers*, 9 Cardozo L. Rev. 531 (1987), is cited extensively in the Petitioner's Amici Brief. However no mention was made of the fact that the Kennedy article was part of a two-article debate on the subject of foreclosure sales as fraudulent transfers in the same issue of the law review, the other article disputing the contentions of the Kennedy article. Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 Cardozo L. Rev. 581 (1987).

attempt to apply that rule, the decision represents no change in the law and should have *no* effect on mortgage lending practices. California is an example of the study's faulty reasoning. Shuchman, *supra* at 633. The study presumes that after the decision of the Ninth Circuit in *Madrid,* rejecting a fraudulent transfer attack on a foreclosure sale, that interest rates would decline and loans would increase, an incongruous result since the Ninth Circuit had never been a *Durrett* jurisdiction.[23] What makes the Shuchman study's reliance on California especially egregious is that the Ninth Circuit decision in *Madrid* actually represented a disappointment for lenders because it did not adopt the Bankruptcy Appellate Panel's determination that the price received at a noncollusive, regularly conducted foreclosure sale should be deemed to meet the reasonably equivalent value standard. In *Madrid,* the affirmance was on other grounds.[24] Thus, if anything, according to Professor Shuchman's premise, the results should have had a negative rather than positive effect on mortgage lending.

Other examples of the distortions embodied in the Shuchman study included the creative classification of states such as New York, Pennsylvania and North Carolina as pro- or anti-*Durrett* based on the existence at the time of one or two bankruptcy court decisions without even District Court consideration of the issue, much less consideration by the appropriate Courts of Appeals. *Id.* at 630-32. Lenders have never contended that one bankruptcy court decision would have the effect of stopping mortgage lending or increasing interest

[23] Indeed, over a year before the Ninth Circuit decision in *Madrid,* the Bankruptcy Appellate Panel in that case had rejected the *Durrett* principle and held that a noncollusive, regularly conducted foreclosure sale would be deemed to be for reasonably equivalent value. It is no surprise therefore that the empirical data failed to show improvement in the mortgage market after the Ninth Circuit's decision since the decision did not represent a meliorating change in the governing law.

[24] The *Madrid* court determined that the transfer in that case had taken place at the time the mortgage was recorded which was more than a year before the bankruptcy, and the court did not reach the question of whether a noncollusive, regularly conducted foreclosure sale meets the reasonably equivalent value requirement of Section 548.

rates. What lenders contend is that if *Durrett* becomes generally accepted (such as by the approval of the *Durrett* principle by this Court), it can only have the effect of increasing mortgage lending costs nationwide and this will result in more cautious underwriting of borrowers' credit and increased interest rates to reflect the increased risk.

b. Questionable Measuring Years

Even if the classification of jurisdictions in the Shuchman study were correct, the results would still be inaccurate because of arbitrary use of measuring years. For example, the Shuchman study considers the date of the 1980 Fifth Circuit decision in *Durrett* as the crucial date in Texas, whereas appeal of that decision continued until certiorari was denied in a contemporaneous case in 1982. *Abramsom v. Lakewood Bank & Trust Co.,* 647 F.2d 547 (5th Cir. 1981), *cert. denied,* 454 U.S. 1164 (1982). In fact, in the year after the denial of certiorari, the Shuchman study itself shows that the increase in residential lending in Texas dropped to less than half of the national increase and that in 1984 residential lending decreased by almost 12% in Texas while residential lending actually increased nationally in 1984. Shuchman, *supra* at 628.[25]

c. One Factor Analysis

Even if the Shuchman study had been carefully and neutrally prepared, its conclusions could be faulted because of its assumption that mortgage lending costs and practices can be based on one factor alone. This represents a denial of the fact that economic conditions, government monetary policy, restrictions imposed by regulatory agencies, as well as costs of operation and bankruptcy risks are all factors bearing on the mortgage market. A change in one factor may offset a change in another, but when it comes to the bottom line, each

[25] The southwest was in a real estate recession at the time and this may have affected the results. Nevertheless, the figures clearly do not support the Shuchman conclusions.

of the factors has an effect on the availability and cost of mortgage financing.

Clearly, if expenses of mortgage lenders increase, interest rates will be affected; if bankruptcy rulings cause these costs to increase, lenders will more carefully underwrite borrowers' credit; and, if mortgage lending becomes more difficult, investment dollars will flow into less difficult investments, particularly from investors such as life insurance companies which regularly invest in corporate and government securities.

2. The Petitioner's Amici Brief Incorrectly Cites Other Studies As Support

Professor Wechsler's empirical study of mortgage foreclosures in New York is cited as support for the carefully crafted statement "In reality, the foreclosure sale purchasers obtain a significant windfall when property is sold for less than a full fair value." (Petitioner's Amici Brief at 45.) The statement hardly needs support of citations. If property is sold for less than its value, it follows that a purchaser who does not have an investment in the property exceeding its purchase price will reap a benefit.[26] What the Petitioner's Amici Brief does not disclose, however, is that the Wechsler study concludes that mortgagees (when they are the "successful" bidders at foreclosure) usually suffer a *loss* on resale of foreclosed properties and thus receive no windfall.[27]

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[26] This brief does not contest that proposition. Indeed it is fully consistent with the reasoning in this brief that if financing and foreclosure costs increase because foreclosure sales are set aside, mortgagees will be more circumspect in extending credit and that the cost will be passed on to borrowers in the form of higher interest rates. See refutation of Shuchman study in section B1 of Part II of this brief.

[27] The study showed that all resales of foreclosed properties, both residential and commercial, produced an average loss of almost $14,000 per property. *Wechsler, supra* at 870. The mortgagee was made whole in only 44% of the cases. *Id.* As pointed out in Robert Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 Cardozo L. Rev. 581, 598, n.67 (1987), the figures understate the true extent of the mortgagee's loss

To support its proposition that foreclosures normally produce a windfall, the Petitioner's Amici Brief (at 45) also cites to the Kennedy article, the Mixon article, John Mixon, *Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism that Increases Personal Tragedy, Impedes Regional Economic Recovery, and Means Little to Lenders*, 22 Tex. Tech. L. Rev. 1, 33-4 (1991), and the Skilton article, Robert H. Skilton, *Assessing the Mortgage Debtor's Personal Liability*, 90 U. Pa. L. Rev. 440, 444-45 (1941-42).

Professor Kennedy's article was not an empirical study. However, while he made no mention of this issue on the page cited by Petitioner's Amici, he did imply that the Wechsler study was support for the assertion in footnote 196 that normally the mortgagee receives a windfall on foreclosure, stating that the scenario is "so prevalent that it is the focus of a recent empirical study and recommendations for reform in foreclosure procedures." Kennedy, *supra* at 578 n.196. While it is true that the Wechsler study dealt with mortgage foreclosures, that study clearly concluded that mortgagees lose money on the sale of foreclosed properties. Wechsler, *supra* at 870.

Both the Mixon and Skilton articles dealt with the issue of deficiency judgments, not with mortgagee windfalls. Nominal bids at foreclosure sales are criticized in those jurisdictions where they can result in deficiency judgments based on the nominal bid. Professor Mixon at the page cited was discussing statutes designed to limit or eliminate liability for a deficiency. Professor Skilton also attacked nominal bidding because of the possibility of large deficiency judgments. Neither claimed that the mortgagee usually receives a windfall because the value of the property exceeds the mortgage balance. Deficiency judgments are not involved in the determination of this case, and this brief does not take issue with the

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because profit would seem to have been determined by comparing the total amount due the mortgagee on foreclosure with the resale price. Apparently not included were lost opportunity costs, maintenance expenses, repairs, brokers' fees, attorneys fees, etc. *Id.*

professors' conclusion supporting state legislation that limits deficiency judgments.

3. The Case At Bar Does Not Involve A Tax Sale

The case at bar involves the issue of whether a noncollusive and regularly conducted *mortgage foreclosure sale* can be deemed by the court to be for reasonably equivalent value. Two of the Petitioner's Amici attempt to relate this case to tax sales of their homes. A decision affirming the Ninth Circuit will not control a decision on whether the constructive fraud provisions of Section 548 are applicable to tax sales of property. The Ninth Circuit did not hold that the amount received at a tax sale equalled reasonably equivalent value. Tax sales are not mortgage foreclosures and are therefore distinguishable from the case at bar. For example, unlike mortgage foreclosures, tax sales are for that portion of tax obligations in default, which bears no direct relation to the value of the property being sold, while in almost all cases, a mortgage is based on a significant percentage of the value of a property. Furthermore, if the tax sales' price inadequacies described by Petitioner's Amici had been found in mortgage foreclosure sales, they could have been struck down before the bankruptcy petitions were filed under the traditional rule of nonbankruptcy mortgage foreclosure law that foreclosure sales may be set aside when the price inadequacy is so great as to shock the conscience of the court.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Dated: August 19, 1993

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 19 1993
OFFICE OF THE CLERK

No. 92-1370

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BFP, a Partnership,
Petitioner,
v.
RESOLUTION TRUST CORPORATION, as Receiver for Imperial Federal Savings Association, *et al.*,
Respondents.

On Writ of Certiorari to the United Sttaes Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICI CURIAE FEDERAL HOME LOAN MORTGAGE CORPORATION, MORTGAGE BANKERS ASSOCIATION OF AMERICA, SAVINGS & COMMUNITY BANKERS OF AMERICA, AND AMERICAN LAND TITLE ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the consideration received from a noncollusive foreclosure sale that is conducted in conformance with applicable state law constitutes "reasonably equivalent value" under 11 U.S.C. 548(a)(2)(A).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1370

BFP, a Partnership,
Petitioner,
v.
RESOLUTION TRUST CORPORATION, as Receiver for Imperial Federal Savings Association, *et al.*,
Respondents.

On Writ of Certiorari to the United Sttaes Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE FEDERAL HOME LOAN MORTGAGE CORPORATION, MORTGAGE BANKERS ASSOCIATION OF AMERICA, SAVINGS & COMMUNITY BANKERS OF AMERICA, AND AMERICAN LAND TITLE ASSOCIATION IN SUPPORT OF RESPONDENTS

Amici Curiae Federal Home Loan Mortgage Corporation ("Freddie Mac"), the Mortgage Bankers Association of America ("MBAA"), the American Land Title Association ("ALTA"), and the Savings and Community Bankers Association ("SCBA") (collectively, the "Amici"), agree with Respondents that the United States Court of Appeals for the Ninth Circuit correctly held that the price received at a noncollusive, regularly conducted foreclosure sale satisfies the reasonably equivalent value requirement of 11 U.S.C. section 548(a)(2)(A), as a matter of law.

STATEMENT OF INTEREST OF AMICI CURIAE

The Amici represent a broad cross-section of participants in the mortgage lending and land title industries. The Amici have joined in this brief because of our strong belief that affirmance of the decision below is necessary to ensure certainty and finality in real estate transactions.

Freddie Mac is a corporate instrumentality of the United States, chartered by Congress. Its statutory mission is to foster and promote a secondary market for the purchase and sale of mortgages on residential real estate. Freddie Mac acts in the secondary mortgage market to increase the liquidity of mortgage investments and thereby make more capital available for home financing. Banks, savings associations and other lenders originate loans on the primary mortgage market, and then sell those loans on the secondary mortgage market to Freddie Mac and others. Freddie Mac, in turn, resells interests in these mortgages to investors in the form of mortgage pass-through securities. However, Freddie Mac remains the mortgagee on the loans which are serviced by a network of local servicing banks. With the funds received from the sale of mortgage-backed securities, Freddie Mac purchases more mortgages from originating lenders who in turn make those funds available to home purchasers. The secondary mortgage market thus greatly increases the supply, and reduces the cost, of home mortgage credit to America's homeowners. To date, Freddie Mac has provided the financing for approximately one in six American homes.

The smooth functioning of the secondary mortgage market depends upon a predictable flow of principal and interest from home mortgages. Freddie Mac has a particularly strong interest in the outcome of this case since it is the mortgagee in a substantial number of single family and multifamily foreclosures each year.

MBAA is a non-profit corporation headquartered in Washington, D.C. and existing under the General Not for Profit Corporation Act of Illinois. MBAA is the primary national trade association devoted to the field of mortgage and real estate financing. Mortgage banking firms, which comprise the largest part of MBAA's total membership of 2,600 corporations, engage in originating, financing, selling and servicing both residential and commercial mortgages. "Origination" is the process of negotiating, arranging, and funding the loan to home buyers. "Servicing" is the collection of payments on existing loans, monitoring the payment of real property taxes and other charges, and facilitating the realization of the security in the event of nonpayment. In 1992, mortgage bankers originated more than $400 billion in single-family mortgages and serviced in excess of $1 trillion in single-family mortgages. MBAA members also originated $10.2 billion in mortgage loans on commercial real estate and serviced in excess of $155 billion in commercial real estate mortgages in 1992. MBAA's interest in this case is based on its members' participation in many aspects of the mortgage industry including foreclosure proceedings.

The Savings & Community Bankers of America ("SCBA") is a national trade association representing approximately 1,900 depository institutions involved in residential mortgage lending. SCBA was formed in 1993 through a merger of the former National Council of Community Bankers and the United States League of Savings Institutions. Member institutions are federal and state-chartered, stock and mutually owned, and insured by the Federal Deposit Insurance Corporation. SCBA members are major originators of one-to-four family home loans, some of which are sold into the secondary markets while others are held as portfolio investments.

The American Land Title Association ("ALTA") is the national trade association of the land title industry. ALTA has approximately 2,300 members, including land title insurers, title insurance agents, abstracters, and as-

sociate members. The principal function of the land title industry is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders, and others involved in real estate transactions. ALTA's interest in this case arises from the interest of its members in the certainty and predictability of laws affecting title to and rights in real estate.

SUMMARY OF ARGUMENT

Section 548(a)(2) of the Bankruptcy Code, 11 U.S.C. section 548(a)(2), grants to a trustee or debtor-in-possession the power to avoid certain transfers made within one year before the date of filing of the bankruptcy petition if the debtor "received less than reasonably equivalent value in exchange for such transfer or obligation." [1] The issue before the Court which has divided the circuits is the proper application of section 548(a)(2) to a noncollusive public foreclosure conducted in conformance with the requirements of applicable state law.[2]

[1] Section 548 provides, in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor . . .
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation . . .

11 U.S.C. section 548(a).

[2] The Ninth and Sixth Circuits follow the rule that is the subject of this appeal. The so-called *Madrid* rule holds that the value obtained at a noncollusive foreclosure sale conducted in accordance with state law conclusively establishes reasonably equivalent value under section 548(a)(2). *See In re Madrid*, 21 B.R. 424 (Bankr. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984); *In re Winshall Settlor's Trust*, 758 F.2d 1136 (6th Cir. 1985). The Fifth Circuit in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980) took the position that a foreclosure sale can be overturned under section 548 if the price is not sufficiently close to the fair market value, and noted that it could find no cases that had approved such a sale for less than 70% of market value. The 70% benchmark has become widely known as the "*Durrett*" rule. A third approach (really a variation on *Durrett*) was taken by the Seventh Circuit in *Bundles v. Baker (In re Bundles)*, 856 F.2d 815 (7th Cir. 1988), which held that reasonable equivalence should depend on all the facts and circumstances of each case, but that normally there is a strong presumption that the foreclosure sale price is reasonably equivalent value. The *Bundles* rule has been followed in three other circuits. *See Barrett v. Commonwealth Federal Savings & Loan*, 939 F.2d 20 (3d Cir. 1991); *Cooper v. Ashley Communications Inc. (In re Morris Communications NC, Inc.)*, 914 F.2d 458 (4th Cir. 1990); *Grissom v. Johnson (In re Grissom)*, 955 F.2d 1440 (11th Cir. 1992).

The petitioner contends that section 548(a)(2) requires a bankruptcy court, in every case, to conduct a valuation hearing to determine whether the foreclosure sale price was reasonably equivalent to the "true value" of the property. The Amici submit that provided the foreclosure sale is regularly conducted and noncollusive such a hearing is unwarranted. Where a debtor has defaulted on its mortgage loan, foreclosure is the bargained for process by which the "true value" of the property is determined in the market place.

From the perspective of all parties—secured creditors, debtors and unsecured creditors—allowing bankruptcy courts to undo valid foreclosure sales based on a case-by-case determination of "reasonably equivalent value" is highly undesirable. As the Ninth Circuit Court of Appeals stated below, such a practice "carries with it the strong potential to destabilize state mortgage transactions" and "produces intolerable uncertainty regarding the finality of any purchase at a foreclosure sale even if the price paid at the sale is close to, but not equal to, the retail market value." *In re BFP*, 974 F.2d 1144, 1148 (9th Cir. 1992), quoting S. Erlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State*

and Federal Objectives, 71 Va.L.Rev. 933, 963-64 (1985).

Nothing in the statute, legislative history, or general principles of law precludes the court below from fashioning a conclusive rule that, in the absence of fraud, collusion or procedural defects, the foreclosure sale price constitutes reasonably equivalent value. *See Madrid v. Lawyers Title Insurance Corp. (In re Madrid),* 725 F.2d 1197, 1204 (9th Cir.), *cert. denied,* 469 U.S. 833 (1984). The lack of a statutory provision allocating the burden of proof on this matter only establishes that Congress left the field open to the courts. *See Cooper v. Ashley Communications, Inc. (In re Morris Communications NC, Inc.),* 914 F.2d 458, 466 (4th Cir. 1990). The application of section 548 to unwind foreclosure sales that conform to all requirements of state law has undeniable negative economic consequences, undermines the public policy favoring free alienation of land and finality and certainty in real estate transactions, creates anomalous results and inconsistency within the Bankruptcy Code, wastes judicial resources, and is unnecessary to the protection and preservation of equity. Thus, the conflict among the courts of appeal should be resolved by affirmance of the Ninth Circuit's decision below.

ARGUMENT

I. THE AMOUNT REALIZED AT A NONCOLLUSIVE, REGULARLY CONDUCTED FORECLOSURE SALE SATISFIES THE REASONABLY EQUIVALENT VALUE REQUIREMENT OF SECTION 548.

The Ninth Circuit Court of Appeals correctly concluded that the amount realized at a noncollusive, regularly conducted foreclosure sale satisfies the reasonably equivalent value requirement of section 548. Petitioner and its amici argue that the plain meaning of "reasonably equivalent value" is "fair market value." However, many courts have pondered the meaning of reasonable equivalence, but all agree that reasonable equivalence is not wholly synonymous with market value. *See Morris Communications,* 914 F.2d at 466, and cases cited therein. As the Seventh Circuit noted, "If anything is clear from the various uses of the word 'value' in the Code, it is that Congress did not mean fair market value when it used 'reasonably equivalent value.'" *Bundles v. Baker (In re Bundles),* 856 F.2d 815, 824 (7th Cir. 1988).

The term "fair market value" appears in two other provisions of the Bankruptcy Code,[3] but was rejected by Congress in enacting section 548. Fair market value has a common, well-understood meaning, which may be subject to minor regional variations, but which in essence means the price for which the property will sell in a transaction between a willing buyer and a willing seller, each acting prudently, knowledgeably, in their own self-interest, and under no compulsion to buy or sell.[4] In short, fair

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[3] *See* 11 U.S.C. section 522(a) (property exempted from debtor's estate) and 11 U.S.C. section 346(j)(7)(B) (excluding from discharge certain indebtedness that is exchanged for an equity contribution under a plan).

[4] *See e.g.* American Institute of Real Estate Appraisers, *The Appraisal of Real Estate,* 8th ed. (Chicago: American Institute of Real Estate Appraisers, 1983), p. 33.

market value means the price that can be obtained under ideal sale conditions.

By opting for reasonably equivalent value instead of fair market value, Congress necessarily required a court applying section 548 to accept a lesser value. A foreclosure sale does not involve a willing seller under no compulsion to sell. Thus, a foreclosure sale does not provide the ideal sales conditions embraced in the definition of fair market value. Moreover, property being sold at foreclosure is typically in a distressed condition. The "true value" of distressed property sold at foreclosure is the highest bid obtained under forced-sale public auction conditions. Where a debtor has defaulted on its mortgage loan, foreclosure is the bargained for process by which the value of the collateral is determined in the market place. Therefore, the foreclosure sale price should be deemed to be reasonably equivalent value provided the sale is noncollusive and comports with all applicable state law requirements.

The price bid at a regularly conducted noncollusive foreclosure sale is the best evidence of reasonably equivalent value given the nature of the transaction. Initial lender notices of nonpayment and subsequent state law foreclosure procedures provide the defaulting borrower many months to seek refinancing or to sell the property. If the property had value in excess of outstanding debt, it would attract new financing and the foreclosure would not occur. The failure of the borrower to sell or refinance conclusively establishes that there is no equity to be recovered under section 548. *See* Part IV, *infra*.

The term "reasonably equivalent value" is a term of art not defined in the Bankruptcy Code. However, that does not mean as petitioner's amici assert that the common separate dictionary meaning of each word must be employed without regard to the legal context of section 548. The term "reasonably equivalent value" first appeared in 1978 when section 548 of the Bankruptcy Code

replaced section 67(d)(2) of the Bankruptcy Act of 1898 which used the term "fair consideration."[5] There is no legislative history to illuminate the 1978 change, but commentators have suggested that the new phraseology was part of an attempt to remove subjective considerations such as good faith from the criteria for the avoidance of fraudulent transfers. *See* Erlich, *supra* at 944-53. As a result, it is fair to conclude that the scope and meaning of the term "reasonably equivalent value" was left to the courts, *Morris Communications*, 914 F.2d at 466, and that an objective test such as compliance with state foreclosure procedures best implements Congressional intent.

Nor does the legislative history of the 1984 amendments to section 548 support equating reasonably equivalent value with fair market value.[6] At the worst, the

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[5] Section 67(d)(2) of the Bankruptcy Act provided that "Every transfer made . . . by a debtor within one year prior to the filing of a petition . . . is fraudulent . . . if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent . . ." Under section 67(d)(1)(e), consideration was deemed to be fair if "when, in good faith, in exchange and as fair equivalent therefor, property is transferred or an antecedent debt is satisfied." *See* 11 U.S.C. section 107(d)(1)(e) and (d)(2) (1976) (repealed 1978).

[6] The Bankruptcy Amendments and Federal Judgeship Act (BAFJA) was enacted on July 10, 1984, and became effective on October 8, 1984. BAFJA proposed three changes to the Bankruptcy Code to address the *Madrid/Durrett* problem: (i) amending the definition of "transfer" in section 101 to cover "foreclosure of the debtor's equity of redemption;" (ii) amending section 548 to clarify its applicability to voluntary or involuntary transfers; and (iii) granting an irrebutable presumption of reasonably equivalent value to a mortgage or third party purchaser at a regularly conducted noncollusive foreclosure sale who paid a price at least equal to the amount of the mortgage debt. Only the first two changes became law. The third change was deleted at the request of Senator Metzenbaum who objected to resolving the *Madrid/Durrett* issue at that time because it had not been considered in committee. *See In re Verna*, 58 B.R. 246, 250 (Bankr. C.D. Cal. 1986).

legislative history is inconclusive. At best, it confirms that the 1984 amendments were intended neither to overrule *Madrid*, nor to cast a cloud over noncollusive foreclosure sales. Jurists and scholars have debated the weight, if any, that should be given a scripted colloquy between Senators Dole and DeConcini which occurred after passage of the 1984 amendments to section 548 to the effect that those amendments were not intended to deal with the question of whether noncollusive regularly conducted foreclosure sales should be deemed to be for a reasonably equivalent value. *See Bundles*, 815 F.2d at 821; *In re Verna*, 58 B.R. 246, 250-251 (Bankr. C.D. Cal. 1986) (Congress took no position on the reasoning in *Madrid*); F. Kennedy, *Involuntary Fraudulent Transfers*, 9 Cardozo L.Rev. 531, 566 (1987); R. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary Nonfraudulent Transfers*, 9 Cardozo L. Rev. 581, 592-594 (1987). Regardless of whether the Senatorial comments are legislative history in the technical sense, they are insightful because they do not attempt to undo what was written, but rather confirm that the legislative intent was neither to support *Durrett* nor to overrule *Madrid*.[7] *Id.* at p. 594, n.58.

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[7] The text of the colloquy, in pertinent part, is as follows: Mr. DeCONCINI: Apparently there may have been some misunderstanding regarding the effect of certain technical amendments made by the recently enacted bankruptcy legislation . . . A question has arisen whether these amendments somehow support the position taken . . . in *Durrett* . . . . My understanding is that these provisions were not intended to have any effect one way or the other on the so called *Durrett* issue. Is my understanding correct?

Mr. DOLE: The Senator's understanding is indeed correct. . . . Consequently, no provision of the bankruptcy bill passed by this body was intended to intimate any view one way or the other regarding the correctness of the position taken . . . in the *Durrett* case, or regarding the correctness of the position taken by . . . *Madrid*, ... which reached a contrary result. . . . [T]he amendment should not be construed to in anyway codify *Durrett* or throw a cloud over noncollusive foreclosure sales. . . . Finally, neither of the [amendments] purport to deal with the question of whether a noncollusive, regularly conducted foreclosure sale should be deemed to be for a reasonably equivalent value.

Mr. DeCONCINI: Then I am correct in concluding that parties in bankruptcy proceedings who seek avoidance of prepetition foreclosure sales would find no support for their arguments in these amendments?

Mr. DOLE: The Senator's conclusion is correct.

Bundles v. Baker (In the matter of Bundles), 856 F.2d 815, 821 n.8 (7th Cir. 1988), *quoting* 130 Cong. Rec. S. 13,772 (No. 131, Pt. II, Oct. 5, 1984).

Petitioner's amici suggest that several cases not involving real estate foreclosure sales show that reasonably equivalent value should be equated with fair market value. However, the meaning of the reasonably equivalent value requirement can only be determined in the context of the paritcular *type* of transaction being scrutinized. That is, whether real estate foreclosure sales satisfy the reasonably equivalent value requirement cannot be determined by examining transactions involving other forms of property. Real estate foreclosure laws provide a unique set of procedural protections which, in the absence of fraud or collusion, establish *ipso facto* reasonably equivalent value. *See* Part IV, *infra*. All of the cases cited by petitioner's amici are either distinguishable on their facts or simply inapposite to the precise question presented to this Court.[8]

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[8] *Gray v. Snyder*, 704 F.2d 709 (4th Cir. 1983) involved valuation of a duty of support under a divorce settlement rather than the valuation of a fungible asset. In *Covey v. Commercial Nat'l Bank*, 960 F.2d 657 (7th Cir. 1992), a secured creditor seized and actually sold certain equipment for an amount in excess of its debt; court was not asked to speculate as to the "true value" of the assets. *In re Ozark Restaurant Equip. Co.*, 850 F.2d 342 (8th Cir. 1988) is a case of actual fraud involving a discounted sale of assets by the debtor to an insider. In *In re McConnell*, 934 F.2d 662 (5th Cir. 1991), the Chapter 7 trustee recovered excessive liquidated damages which were unenforceable under state law. *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479 (4th Cir. 1992) finds no fraudulent transfer where the debtor was merely repaying money it had received on a line of credit. *In re Abbott's Dairies*, 788 F.2d 143 (3rd Cir. 1986) does not address section 548. Rather, it con-

II. THE *DURRETT/BUNDLES* RULE HAS AN UNDENIABLE NEGATIVE IMPACT ON ALL PARTICIPANTS IN REAL ESTATE TRANSACTIONS.

Permitting a bankruptcy court to reexamine the facts and circumstances of a noncollusive, regularly conducted foreclosure sale to determine whether reasonably equivalent value was obtained has undeniable and unjustifiable negative effects on mortgage lenders, borrowers, title insurers, and purchasers at foreclosure sales. As a practical matter, the threat of a section 548 challenge casts a cloud of uncertainty over the title received at a foreclosure sale, discourages participation of third party purchasers at such sales, impairs the ability of the foreclosure purchaser to resell the property, and exposes the buyer to unreasonable risks if he does resell before it is certain that no such challenge can be commenced. Moreover, in the post-*Durrett* world, the purchaser at foreclosure incurs significant additional economic burdens due to the higher costs of title insurance (if he can obtain it), discounted resale prices, and an extended holding period before resale.

The principal negative effect of the *Durrett/Bundles* rule is the risk that a properly conducted foreclosure sale that comports with state law may be set aside if a bankruptcy petition is filed by the mortgagor within one year after the sale.[9] This risk erodes the essential right that

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cerned a challenge to a sale of assets under section 363 of the Bankruptcy Code on the grounds that the buyer did not purchase in "good faith." Interestingly, the *Abbott's* Court noted that if the buyer had purchased in "good faith," then the price paid is "fair and reasonable." *Id.*, 788 F.2d at 149. We note also that the interests in this case of petitioner's amici, Frank Allen and Levander and Elnora McKeever, seem remote at best. Those amici were involved in tax sales which do not afford the full procedural protections of a real estate foreclosure initiated under state law by a private mortgagee.

[9] In the event a bankruptcy petition is filed within one year of the sale, this uncertainty will continue until the bankruptcy case is closed (in some cases for several years), since a fraudulent transfer action may be initiated at any time before the earlier of two years after the appointment of a trustee or the time the case is closed or dismissed. 11 U.S.C. section 546(a). If the case is converted to Chapter 7 rather than dismissed, then provided no trustee was previously appointed, the Chapter 7 trustee will have an additional two years in which to commence a fraudulent transfer action. *See In re Bingham Systems, Inc.*, 139 B.R. 809, 812 (Bankr. N.D. Miss. 1991).

a mortgage lender relies upon for the security of its loan —the right to foreclose on the property in the event of default. The petitioner's amici characterize industry concern for this risk as "chimerical" and unsupported by empirical evidence. Petitioner's amici are simply wrong.

The risk that a valid foreclosure sale may be set aside years later by a bankruptcy court impairs the quality of title obtained at a foreclosure sale. In recognition of this fact, title insurers began writing the so-called "*Durrett* Exception" (also known as the "Creditor's Rights Exception") shortly after *Durrett* was decided. This exception excludes from coverage under title insurance policies issued to purchasers at foreclosure sales, or to their mortgage lenders, the possible claim that the foreclosure sale may be avoided under bankruptcy laws. In 1990, the American Land Title Association's form loan policy made such an exclusion standard language for all title insurance.[10]

Another well-recognized effect of the *Durrett/Bundles* rule is that potential third party buyers at foreclosure

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[10] The 1990 ALTA Loan Policy (4-6-90) excludes "[a]ny claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditor's rights laws." The 1992 Revised ALTA Loan Policy (10-17-92) refined the *Durrett* exception to exclude "[a]ny claim, which . . . by reason of the operation of federal bankruptcy, state insolvency, or similar creditor's rights laws that is based on: (a) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer. . ."

sales either do not participate at all or discount their bids to account for the risk that the purchase may be avoided in bankruptcy.[11] This results in fewer value-maximizing sales to third parties, and the foreclosing lender more frequently acquiring the property.[12] The lender must then incur the often substantial carrying and resale costs of "Real Estate Owned." The lender who purchases at foreclosure may be compelled to warehouse the property until it is certain that no action can be filed under section 548. During this period, the lender suffers further lost income on the nonproducing loan and must pay all the normal holding costs such as taxes, insurance, and the cost of repairs to preserve the security. An unoccupied property may be subject to vandalism resulting in substantial additional costs. In the commercial or multifamily context, these maintenance and carrying costs can be particularly burdensome.[13] Like any other cost of doing business, the

[11] *See e.g. In re BFP*, 974 F.2d 1144, 1148 (9th Cir. 1992); *Abramson v. Lakewood Bank & Trust*, 647 F.2d 547, 550 (5th Cir. 1981) (dissenting opinion), *cert. denied*, 454 U.S. 1164 (1982); *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1139-40 (6th Cir. 1985); *In re Gilmore*, 31 B.R. 615, 618 (E.D. Wash. 1983); *In re War Eagle Floats, Inc.*, 104 B.R. 398, 401 (Bankr. E.D. Okla. 1989; *In re Ristich*, 57 B.R. 568, 577 (Bankr. N.D. Ill. 1986); *In re Alsop*, 14 B.R. 982, 987 (Bankr. D. Alaska 1981).

[12] Critics of state law postforeclosure redemption periods have observed the same phenomenon. *See* E. Murray, *Statutory Redemption: The Enemy of Home Financing*, 28 Wash. L. Rev. 39, 40 (1953).

[13] If the property is a hotel, nursing home, apartment complex, office building, factory or other ongoing business, the foreclosing lender may be obliged to operate the business to prevent deterioration of the collateral pending resale. In addition to the expense of funding operating shortfalls, the lender may face other difficulties. The business may be subject to state and/or federal regulation. Operation of the foreclosed property may result in unexpected tax consequences such as subjecting the lender's entire portfolio within the state to state tax. A mortgagee operating foreclosed property may in some states be required to qualify to do business in that state. If that is not possible for an out of state bank, then the mortgagee may have to engage a trust company to operate the property, or develop an alternative arrangement to avoid doing business illegally. *See* R. Lifton, *Real Estate in Trouble: Lender's Remedies Need an Overhaul*, 31 Bus. Law. 1927, 1940-41 (1976).

increased costs of foreclosure associated with the *Durrett/Bundles* rule must ultimately be passed onto the consumers of mortgage loans.[14]

In the post-*Durrett* world, the acquiring party at a foreclosure sale may be taking a substantial risk if he resells prematurely. Two particularly egregious cases illustrate this problem. In *Coleman v. Home Savings Association (In re Coleman)*, 21 3B.R. 832 (Bankr. S.D. Tex. 1982), the purchaser at foreclosure was a second mortgagee who purchased the property for the amount of its debt ($5,700) subject to a first mortgage. The second mortgagee then resold the property for $5,700, again subject to the first mortgage. The court determined that the value of the property was not less than $40,000, and found that a fraudulent transfer had occurred. The court indicated that in the event it was determined that the purchaser from the second mortgagee was a good faith purchaser, and that therefore the property could not be recovered pursuant to section 550(a)(1), then the second mortgagee would be liable for damages equal to the value of the property less its debt ($34,300). Similarly,

[14] Petitioner's amici rely on Professor Shuchman's article, *Data on the Durrett Controversy*, 9 Cardozo L. Rev. 605 (1987), to suggest that *Durrett* had no impact on credit markets. However, the Shuchman study has been criticized for being based on certain flawed methodology and the false assumption that *Durrett* would immediately manifest itself in higher interest rates, fewer loans, or reduced loan to value ratios. *See* R. Zinman, *Durrett Data: Shucking the Husks From the Grain*, 9 Cardozo L. Rev. 1013 (1988). The pricing, terms and conditions of mortgage loans are influenced by a myriad of factors. It is simply impossible to isolate the effects of any single factor. What is undeniable is that the *Durrett/Bundles* rule results in additional risk to lenders. *Cf.* Murray, *supra* at 41-42 (noting that Washington state redemption period had effect of diverting capital investment and altering the terms and conditions of mortgage lending).

in *In re Lindsay*, 98 B.R. 983 (Bankr. S.D. Cal. 1989), the court found that the appropriate remedy where the first mortgagee had purchased the property at foreclosure for less than reasonably equivalent value and the property's value had declined following the sale, was for the first mortgagee to pay the balance owing on the junior lienor's note less the amount due on its own note.

Coleman and *Lindsay* are good examples of the foreclosure purchaser's predicament under the *Durrett/Bundles* rule. To make matters worse, there is little the purchaser at foreclosure can do to protect himself from this nightmare scenario. It is not enough to suggest that the buyer can assure himself of clear title by bidding at least 70 percent of fair market value or even full market value, for it is virtually impossible to predict what the value of the property will be determined to be with hindsight by a bankruptcy judge years later. Appraisals prepared by qualified and experienced appraisers often differ significantly. Even if the buyer believes he had obtained the best appraisal possible, or obtains multiple appraisals, the trustee in bankruptcy would not be precluded from challenging the foreclosure sale and engaging the buyer in a subsequent "battle of the appraisers." [15] Moreover,

[15] Accurate computation of reasonably equivalent value presents exactly the type of difficult factual determination that calls for the use of a conclusive rule. Where a factual determination is unwieldly, time-consuming, or results in unwarranted uncertainty, it is appropriate for the court to employ a conclusive evidentiary rule. *Cf. Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344-48 (1982) (reversing court of appeal's order for a full factual inquiry into purpose and effect of alleged price-fixing arrangement under antitrust law, and commenting that "[f]or the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.") Conclusive rules are particularly appropriate in bankruptcy proceedings where prompt, efficient, low-cost resolution of disputes is desirable. *See e.g. Drabkin v. A.I. Credit Corp.*, 800 F.2d 1153, 1157 (D.C. Cir. 1986) (presumption that prepetition payments to undersecured creditor are applied to the unsecured portion of the creditor's claim "is properly treated as conclusive

even if the purchaser could determine fair market value with certainty, most courts reject talismanic adherence to the "bright line" 70 percent rule, and following *Bundles* believe they must review all the facts and circumstances on a case by case basis to determine reasonably equivalent value. Thus, absent the *Madrid* rule, it is virtually impossible to determine at the time of foreclosure whether the sale can withstand a section 548 challenge.

Nor do the protections of sections 548(c) and 550 mitigate the negative effects of the *Durrett/Bundles* rule. Under section 548(c), the good faith purchaser at a foreclosure sale is given a lien on the property recovered by the trustee to the extent it gave value to the debtor.[16] Under section 550(d), the good faith transferee has an additional lien on the property to secure the lesser of the costs of any improvements it made or any resulting increase in the value of the property. "Improvements" include physical additions, repairs, taxes, payments to superior lienholders, and the costs of preserving the property.[17] A trustee may not recover from a subsequent good

and not subject to rebuttal. . ."); *Bakst v. Vono (In re Gold Rush East)*, 55 B.R. 126, 127 (Bankr. S.D. Fla. 1985) (failure to comply with state law bulk transfer rules raises conclusive presumption of fraud).

[16] Section 548(c) provides:

> (c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

11 U.S.C. section 548(c).

[17] Section 550(d) provides:

> (d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

faith transferee who takes the property for value and without knowledge of the voidability of the transfer. 11 U.S.C. section 550(b).

These statutory liens do not adequately protect the foreclosure sale purchaser. In a declining real estate market, the value of the property may go down despite any improvements. In that case, giving the initial transferee a lien is no protection at all. *See Lindsay*, 98 B.R. at 992. Even if the market value of the property remains stable between acquisition and avoidance, the transferee who improves the property could lose his investment if the bankruptcy court were to determine that the value added to the property by the improvements was less than their cost. *See In re General Industries, Inc.*, 79 B.R. 124, 137 (Bankr. D. Mass. 1987) (creditor given section 550(d) improvements lien for roof repairs equal to only one half of the actual cost of those repairs).

More importantly, the statutory liens fail to remedy the practical negative effects of the *Durrett/Bundles* rule. In particular, section 550 does nothing to counteract the disincentive to third party purchasers. What individual seeking a home for his family would bid on a property being sold at foreclosure knowing that he might have to return it years later, or pay out the difference between its "true

---

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

11 U.S.C. section 550(d).

value" and the price he paid plus the value of improvements? Likewise, no rational investor would buy a property at foreclosure just so that he can have a lien on the property or the improvements. Rather, investors buy properties at foreclosure for their "upside" potential. As long as that potential is threatened by section 548, value-maximizing foreclosure sales to third parties will be rare indeed. As the Ninth Circuit commented in declining to apply state foreclosure redemption periods to FHA foreclosures,

> What third party would bid and pay the full market value, knowing that he cannot have the property to do with as he wishes until a set period has gone by, and that at the end of the period he may not get it, but instead may be forced to accept a payment which may or may not fully reimburse him for his outlays?

United States v. Stadium Apartments, 425 F.2d 358, 365-66 (9th Cir. 1970).

III. THE *DURRETT/BUNDLES* RULE UNDERMINES THE PURPOSE OF SECTION 548 AND RESULTS IN INCONSISTENCY WITHIN THE BANKRUPTCY CODE.

Applying section 548 to noncollusive regularly conducted foreclosure sales undermines the recovery of equity which is the objective of section 548. As noted above, due to the uncertainty of title acquired through foreclosure, potential buyers at foreclosure sales may discount their bids further than they otherwise would, value-maximizing sales to third parties are less frequent, and mortgagees are more likely to be the successful bidders. Perversely, such a result almost guarantees that any equity that may have been present will be lost.

The *Durrett/Bundles* rule is inconsistent with Bankruptcy Code policy and provisions that protect the rights of secured creditors. In fact, the *Durrett/Bundles* rule creates the anomalous result that a secured creditor may

be in a worse position than if the foreclosure had not been completed before the debtor filed its bankruptcy petition. If the borrower files a bankruptcy petition on the eve of foreclosure, as frequently is the case, then the foreclosure proceedings are automatically stayed pursuant to 11 U.S.C. section 362. Under section 506(b), to the extent the value of his collateral exceeds the amount of his claim, a secured creditor is entitled to postpetition interest on his claim, as well as any reasonable fees, costs or charges provided for under his security agreement. *See* 11 U.S.C. section 506(b). However, if the debtor files its petition after foreclosure and subsequently mounts a successful section 548 challenge, the foreclosure is retroactively void, but the secured creditor is not restored to the same position he would have been in if the foreclosure had not taken place.

In the event that a transfer is avoided under section 548, then a trustee or debtor-in-possession may recover for the estate "the property transferred, or, if the court so orders, the value of such property . . ." 11 U.S.C. section 550(a). If the foreclosure had not occurred, then the oversecured creditor would have been entitled to a lien for the full amount of the debtor's obligations under the applicable loan documents, including continued accrual of interest, default interest and other chargeable items. However, if a foreclosure is avoided under section 548, and the court chooses the remedy of a money judgment, then in addition to being required to pay the difference between its bid price and the court's estimation of value, the hapless secured creditor who has resold the property for a loss, appears also to lose the interest and other items to which it would have been entitled in bankruptcy, if the foreclosure had not occurred. Likewise, where the court chooses the remedy of reconveying the property to the debtor, the oversecured creditor does not receive the same bankruptcy protections that it would have received if the foreclosure had not occurred. As discussed above, the section 550(d) lien is often inadequate to compensate the secured creditor for carrying costs and other improvements. Moreover, the section 548(c) lien

only covers the value given, i.e. the bid price at foreclosure which is rarely 100 percent of the amount of the secured creditor's claim. Finally, in at least one case, the bankruptcy court ordered reconveyance of the property but deprived the secured creditor of interest accruing in the gap period between foreclosure and reconveyance. *See In re General Industries, Inc.*, 79 B.R. 124, 137 (Bankr. D.Mass. 1987). Fairness and consistency within the Bankruptcy Code mandate that the oversecured creditor's interests should be equally protected regardless of whether the foreclosure sale is avoided. If the *Madrid* rule were followed, these unfair and anomalous results would not occur.

Recent decisions of this Court interpreting the Bankruptcy Code recognize and protect both the secured creditor's "bargained for" right to foreclose and his secured interest in any "equity cushion" above the amount of his claim. In *Dewsnup v. Timm*, —— U.S. ——, 112 S.Ct. 773 (1992), a Chapter 7 debtor, whose bankruptcy petition had stayed the mortgagee's attempts to foreclose on certain real estate, asserted that under section 506(d) of the Bankruptcy Code, the creditor only retains a lien up to the value of the property securing the debt. The bankruptcy court held a valuation hearing, and agreed with the debtor that the lien for the amount above the value of the property is void.[18] Recognizing the ambiguity of the term "secured claim" in section 506(d), this Court rejected the debtor's argument, and protected the secured creditor's "bargained for" lien on the amount of value exceeding its debt:

> The practical effect of petitioner's argument is to freeze the creditor's secured interest at the judicially determined value. By this approach, the creditor would lose the benefit of any increase in the value of the property by the time of the foreclosure sale. The increase would accrue to the benefit of the debtor, a result some of the parties describe as a "windfall."

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[18] Section 506(d) provides, in pertinent part, that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void. . ."

> We think, however, that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee. . . . Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed and who had nothing to do with the mortgagor-mortgagee bargain.

Dewsnup, —— U.S. ——, 112 S.Ct. at 778. Similarly, in *Nobelman v. American Savings Bank,* —— U.S. ——, 61 U.S.L.W. 4531 (U.S. June 1, 1993) (No. 92-641), this Court held that "cram down," or the reduction of a secured claim to the value of the collateral, may not be imposed under a Chapter 13 plan because the mortgagee's bargained for right to repayment in accordance with the relevant mortgage instruments is protected in Chapter 13. Permitting bankruptcy courts to set aside noncollusive regularly conducted foreclosure sales is inconsistent with the clear thrust of these cases interpreting the Bankruptcy Code to preserve the bargained for rights and remedies of mortgagors and mortgagees.

IV. THE *DURRETT/BUNDLES* RULE IS UNNECESSARY TO PRESERVE EQUITY AND WASTES JUDICIAL RESOURCES.

The petitioner's amici assert that in the typical foreclosure sale, the mortgagee purchases the property for a nominal price and reaps a "windfall" on resale. They further contend that the purchasing mortgagee then realizes a "double recovery" by obtaining a deficiency judgment. This alleged result is, in their view, a common occurrence due to the failure of state foreclosure procedures to optimize sale prices, and one which Congress intended to remedy through section 548.

The contentions of petitioner's amici are completely at odds with reality. Freddie Mac's experience does confirm that in today's foreclosure market, the mortgage lender

is almost always the purchaser at foreclosure sales. However, this has little to do with any perceived inadequacy of state foreclosure laws. Rather, it reflects the fact that if there had been any equity in the property, the debtor would have refinanced the property, or others would have out bid the mortgage lender, and any excess would have gone to junior lienors or to the mortgagors. *See United States v. Stadium Apartments, Inc.,* 425 U.S. at 366.

Based on amicus Freddie Mac's experience, the reality of foreclosure is that the purchasing mortgagee rarely, if ever, acquires a property that can be resold for an amount that exceeds its debt and the costs of sale. There are simply no windfall profits in the resale of foreclosed property. In 1992, Freddie Mac disposed of 6,630 single-family houses, with an average loss per property of $23,882. On average, Freddie Mac held these properties for 158 days before resale. In the multifamily area, Freddie Mac resold 156 apartment complexes in 1992 for an average loss per property of $792,110. On average, Freddie Mac held foreclosed multifamily properties in 1992 for 418 days before resale.[19]

Many factors combine to increase the loss to mortgagees on resale. Often, properties that are acquired at foreclosure have been neglected by the mortgagor and require substantial repairs. Carrying costs during the holding period such as taxes, insurance, and other expenses of preserving the collateral may be substantial. *See* Part II, *supra,* at p. 14. As the seller of real estate, the mortgagee is required to pay all the normal costs of sale including marketing costs, broker's fees, and loan points. Knowledge by potential purchasers that the property is owned by a mortgage lender generally results in relatively low offers.

Avoiding a regularly conducted noncollusive foreclosure sale through section 548 is unnecessary to protect any

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[19] *See* Federal Home Loan Mortgage Corporation, Information Statement Dated April 9, 1993, p. 34.

equity that the debtor may have in the property. Typically, there is a considerable time period between default and foreclosure. For example, Freddie Mac does not normally initiate foreclosure proceedings on single family mortgages until a mortgage has been delinquent for at least 90 days. During that period, the borrower will have received numerous notices from the servicer. Virtually all state foreclosure laws provide for a substantial preforeclosure redemption period durir.g which the debtor may redeem the property by full payment of the outstanding indebtedness. Further, state foreclosure schemes provide for additional notices to the borrower, including, in some states with judicial foreclosure procedures, a requirement of time-consuming court proceedings at several stages of the foreclosure process. In addition, all state foreclosure laws require substantial time periods for public advertising. The result is that a borrower in default of his mortgage typically has many months in which to negotiate a workout with his lender, to refinance, or to sell the property. Clearly, the default and foreclosure process provides an adequate opportunity for the borrower to salvage any perceived equity.

The application of section 548 to a properly conducted noncollusive foreclosure sale does not assist in recovering this alleged equity, but only wastes judicial resources by needlessly multiplying litigation. A foreclosure sale may always be challenged in a state court proceeding, as occurred in the case at bar. Moreover, in states which utilize the deed of trust, the disappointed borrower has the further remedy of a fiduciary liability suit against the trustee. The trustee under a deed of trust has under a fiduciary duty to take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his interest. *McHugh v. Church*, 583 P.2d 210, 214 (Alaska 1987); *Fralin v. Aronovich*, 247 F.2d 468, 471 (4th Cir. 1957). Allowing a bankruptcy court to unwind a valid noncollusive foreclosure sale through section 548 gives the borrower an unwarranted "second bite

of the apple" resulting in negative repercussions for all participants in the mortgage industry—consumers and producers alike.

CONCLUSION

It makes good sense to conclude as both the Ninth and Sixth Circuits have done that the "reasonably equivalent value" of real estate sold at a regularly conducted noncollusive foreclosure sale is the price received at that sale. Such a rule promotes the important policy of certainty and finality in real estate transactions, is consistent with recent decisions of this Court, conserves judicial resources, and avoids anomalous results and negative economic consequences. Accordingly, the decision of the Ninth Circuit below should be affirmed.

Respectfully submitted,

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FILED
AUG 20 1993
OFFICE OF THE CLERK

No. 92-1370

In The

Supreme Court of the United States

October Term, 1993

In Re: BFP, A Partnership, Debtor

BFP, A PARTNERSHIP,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR IMPERIAL FEDERAL SAVINGS ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents.

On Writ of Certiorari
To The United States Court Of Appeals
For the Ninth Circuit

BRIEF OF CALIFORNIA TRUSTEE'S ASSOCIATION, CALIFORNIA LAND TITLE ASSOCIATION, CALIFORNIA BANKERS ASSOCIATION, THE MORTGAGE INSTITUTE OF CALIFORNIA AND CALIFORNIA INDEPENDENT MORTGAGE BROKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Amici Curiae California Trustee's Association (CTA), California Land Title Association (CLTA), California Bankers Association (CBA), the Mortgage Institute of California (MI), and California Independent Mortgage Brokers Association (CIMBA) (collectively Association) respectfully submit their brief in support of respondents Resolution Trust Corporation, as receiver for Imperial Savings & Loan Association, Paul Osborne, William Little, Dennis Roy, Arthur Ritz, Jose Cruz, and Richard Marcz (Respondents) in the above-entitled appeal.

INTEREST OF AMICI CURIAE

Amicus CTA is comprised of trustees under deeds of trust secured by real property in California as well as of members working for industries which provide support services in the nonjudicial foreclosure process (e.g., legal newspapers, title companies, posting services and attorneys). CTA's members provide reconveyance and nonjudicial foreclosure services for literally all lenders in the California real estate market.

Amicus CLTA is a nonprofit corporation composed of title insurance companies and underwritten title companies doing business in California. Approximately 130 of the approximately 136 such companies doing business in California are members of CLTA. CLTA members provide title insurance and related products and frequently act as trustees under deeds of trust secured by real property.

Amicus CBA is a nonprofit corporation with over 420 member banks, representing virtually every commercial bank in California.

Amicus MI, whose current corporate membership exceeds 225 companies, is a trade association which, since 1954, has represented the interests of mortgage loan brokers and others engaged in the business of making, arranging, and servicing real estate loans in California.

Amicus CIMBA is a nonprofit California corporation which functions as a statewide trade association comprised primarily of mortgage loan brokers whose main business is arranging residential loans for private borrowers which are generally funded by other private individuals or small pension plans.

Both MI and CIMBA are members of the Real Estate Finance Advisory Committee to the California Real Estate Commissioner and each sponsors continuing education seminars approved for credit by the California Department of Real Estate. Each of the Amici Association have been actively involved in legislation and/or as amici before state and federal courts of appeal (including Supreme Courts) regarding nonjudicial foreclosure, title, title insurance, banking, mortgage brokering, and lending law.

The Association's primary interest in the Court's resolution of the instant case is that if Petitioner's position is adopted by the Court, such a result would disturb the delicate balance of rights and responsibilities between trustors, beneficiaries, and trustees established over many years by contracts and statutes enacted by the California legislature; it will impose ambiguous duties upon beneficiaries and trustees, many of the costs for such new and ambiguous duties will not be recoverable under state law; it will lead to more bankruptcies as well as more litigation regarding title and foreclosures; it will create uncertainty of title, uninsurable and unmarketable title; it will further destabilize the real estate market and lending industry, lower property values, unnecessarily increase the costs of foreclosure; it will increase the costs of borrowing; and it will reduce the availability of financing, particularly private financing, upon which the most needy consumer-borrowers rely.

SUMMARY OF ARGUMENT

The issues before the Court involve what has been commonly referred to as the *Madrid/Durrett/Bundles* controversy. That is, whether or not 11 U.S.C. § 548(a)(2)(A) (the constructively, fraudulent conveyance section of the Bankruptcy Code) can be used to set aside a regularly conducted, non-collusive nonjudicial foreclosure sale. The fraudulent conveyance laws, before *Durrett*, have never been used to set aside non-collusive, regularly conducted nonjudicial foreclosure sales as these laws were never intended to apply to such sales.

Consonance between state foreclosure laws and bankruptcy law is critical to the stability of titles and the lending industry.

Foreclosure is not an "evil" procedure. It is a necessary step in the real property lending process to assure that losses to lenders are minimized. Without security and foreclosures on defaulted loans, there would be no lending industry. The true focus should be on owners who fail to market their properties when it is clear that the property cannot be retained.

State foreclosure laws, at least in California, are protective of all parties to the transaction. Applying the bankruptcy laws to effect a federal right of redemption, heretofore unheard of, would drive down bidding on properties and result in fewer lenders in the market, particularly secondary lenders. To the detriment of the consumer-borrower, the cost of borrowing will increase, the ease of borrowing or availability of funds will decrease, and the state of post-foreclosure title will become uncertain and uninsurable reducing the ability to resell properties after foreclosure at their fair market value. The fear of having an investment tied up for up to three years after a foreclosure sale will send private (often junior) lenders into other investments.

ARGUMENT

I. The Fraudulent Conveyance Laws Have Never Been Applied to Upset Legitimate Business Transactions Nor Used To Set Aside Non-Collusive, Non-Fraudulent Foreclosure Sales of Real Property Security Interests.

A. Introduction.

The questions before the Court involve the *Madrid/Durrett/Bundles* debate[1] and the imposition of either a "percentage of fair market value" and/or a fact-specific standard on state-controlled foreclosure sales in evaluating "reasonably equivalent value" under 11 U.S.C. § 548(a)(2)(A). Association strongly disagrees with the conclusions found in *Durrett* and *Bundles* which could cripple an entire industry, render titles unmarketable for years, increase the cost of borrowing to the consuming public, reduce the availability of loan funds particularly to those most in need of loans, invite litigation in every foreclosure proceeding, and encourage bankruptcy filings in an effort to enforce a federally created right of redemption which has never before existed.

B. Some History of the *Madrid/Durrett/Bundles* Controversy.

Madrid (BAP) held that a non-collusive, regularly conducted foreclosure sale ("valid foreclosure sale")

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[1] The two *Madrid* opinions will be referred to as *Madrid* (BAP) signifying the case of *Madrid v. Lawyers Title Ins. Corp.* (*In re Madrid*), 21 B.R. 424 (9th Cir. BAP 1982); *Madrid* (9th Cir.) signifying the case of *Madrid v. Lawyers Title Ins. Corp.* (*In re Madrid*), 725 F.2d 1197 (9th Cir. 1984), cert. denied, 469 U.S. 833 (1984); *Durrett v. Washington National Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) will be referred to as *Durrett*; *Bundles v. Baker* (*In re Bundles*), 856 F.2d 815 (7th Cir. 1992) will be referred to as *Bundles*.

constituted "reasonably equivalent value" for purposes of 11 U.S.C. § 548(a)(2)(A)[2]. *Madrid* (9th Cir.) affirmed *Madrid* (BAP), but on the ground that a foreclosure sale is not a "transfer" for purposes of § 548. *Durrett* held that a foreclosure sale constituted a transfer under § 548 and could be attacked as a fraudulent conveyance if the proceeds were less than "reasonably equivalent value" as measured by the fair market value of the property. *Bundles* created a fact-specific inquiry, requiring a determination of whether an appraisal was obtained, whether there was competitive bidding, and whether the sale was widely advertised. Deference was to be given to the state foreclosure proceedings, if possible. (*Bundles* at 824, 825.) BAFJA[3] amended the definition of "transfer" to include foreclosure of the debtor's equity of redemption and to make it clear that § 548 applied to involuntary transfers.

Included in the legal debate is the effect of the BAFJA amendments; whether *Durrett* was codified; whether *Madrid* (9th Cir.) was overruled; whether *Madrid* (BAP) was left intact regarding "reasonably equivalent value"; and, whether the amendments changed anything at all.

Among the lower court cases in the 9th Circuit that have addressed the issues are:

(1) *In re Lindsay*, 98 B.R. 983 (Bankr.S.D.Cal. 1989);

(2) *In re Verna*, 58 B.R. 246 (Bankr.C.D.Cal.1986);

(3) *In re Kachanizadeh*, 108 B.R. 734 (Bankr.C.D.Cal. 1989);

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[2] All references will be to Title 11, United States Code, unless otherwise specifically indicated. References to the "Civil Code" or to "Civ. Code" are to the California Civil Code. References to the Code of Civ. Proc. or Code of Civil Procedure are to the California Code of Civil Procedure.

[3] BAFJA refers to the Bankruptcy Amendments & Federal Judgeship Act of 1984, Pub. L. No. 98-353.

(4) *In re Ehring*, 91 B.R. 897 (9th Cir. BAP 1988), herein, *Ehring* (BAP);

(5) *Ehring v. Western Community Moneycenter*, (*In re Ehring*) 900 F.2d 184 (9th Cir. 1990), herein, *Ehring* (9th Cir.);

(6) *In re BFP*, 974 F.2d 1144 (9th Cir. 1992), herein, *In re BFP* (9th Cir.).

The issues before the Court have been the subject of an ongoing legal debate in the form of a series of law review articles from Professor Robert M. Zinman, Professor Frank R. Kennedy, and Professor Philip Shuchman.[4] The articles address both sides of the controversy now before the Court and include controverted statistical evidence regarding the impact of *Durrett*.

Following is a brief history and statement of the purpose of fraudulent conveyance laws, a description of nonjudicial foreclosures in California, and the effect of the cases and legislation since *Durrett*.

C. History and Purposes of the Fraudulent Conveyance Laws.

Fraudulent conveyance statutes, which date back to before the Statute of 13 Elizabeth in 1571, have all been intended to prohibit transfers that hinder, delay, or defraud creditors (*Kupetz v. Wolf*, 845 F.2d 842, 846 (9th Cir. 1988)), not to upset legitimate, above-board business transactions. (*Id.* at page 848.)

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[4] The articles are: Kennedy, *Involuntary Fraudulent Transfers*, 9 Cardozo L. Rev. 531 (1987), (herein, Kennedy); Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 Cardozo L. Rev. 581 (1987), (herein, Zinman); Shuchman, *Data on the Durrett Controversy*, 9 Cardozo L. Rev. 605 (1987), (herein, Shuchman Data); and, Zinman, *Durrett Data: Shucking the Husks from the Grain*, 9 Cardozo L. Rev. 1013 (1988), (herein, Zinman Data).

D. The Purpose of California Fraudulent Conveyance Law in No Way Differs from that of Bankruptcy Code § 548.

Section 548 and the California fraudulent conveyance laws have the same purpose. (*Kupetz v. Wolf*, 845 F.2d 842, 845 (9th Cir. 1988).) The purpose of California's law is to prevent debtors from placing property beyond the reach of their creditors when such property should legitimately be available for satisfaction of creditors' demands. (*Chichester v. Mason*, 43 Cal.App.2d 577, 584, 111 P.2d 362 (1941).) California's law explicitly exempts non-collusive enforcement of a lien from the fraudulent conveyance statutes. (Civ. Code § 3439.08(e)(2).) The "Legislative Committee Comment – Assembly" [West's Ann.Cal.Civ. Code, 1990 Supp., § 3439.08] on the 1986 addition to California's version of the Uniform Fraudulent Transfer Act states:

"Paragraph (2) of subdivision (e) rejects the rule of such cases as *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair value); and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), cert. denied, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Paragraph (2) of subdivision (e) adopts the view taken in *Lawyers Title Ins. Corp. v. Madrid* (*In re Madrid*), 21 B.R. 424 (B.A.P. 9th Cir. 1982), aff'd on another ground, 725 F.2d 1197 (9th Cir. 1984), that the price bid at a public foreclosure sale determines the fair value of the property sold . . . The premise of the paragraph is that 'a sale of the collateral by the secured party as the normal consequence of default

> . . . [is] the safest way of establishing the fair value of the collateral. . . . ' [cite omitted]."

The 6th Circuit agrees that reasonable equivalence for the purposes of a foreclosure sale under § 548(a)(2)(A) should be consonant with the state law of fraudulent conveyances. (*In re Winshall Settlor's Trust*, 758 F.2d 1136, 1139 (6th Cir. 1985).)

E. Fraudulent Conveyance Laws Emanating from the Statute of 13 Elizabeth Have Sought to Correct the Actual Fraud of a Debtor and His Transferees, Establishing "Badges of Fraud" to Prove That Which Cannot Be Proved by Direct Evidence.

Fraudulent conveyance statutes were enacted to prevent dubious, fraudulent activities of the debtor and were never intended to overturn a debtor's legitimate business activities. A succinct summary of the laws and their purposes is found in 4 Collier, *Bankruptcy Practice Guide*, "Fraudulent Conveyances", par. 65.02, pages 65-3 through 65-4:

> "The origin of modern fraudulent conveyance laws can be traced directly back through the development of the common law to the Statute of 13 Elizabeth, passed by Parliament in 1570. This heritage indicates that the values which the fraudulent conveyance laws are designed to vindicate are absolutely fundamental to, indeed the very keystone of, the Anglo-American approach to debtor-creditor relations. Those values are easily summarized: A person or entity with debts is not free to deal with his property in a manner which substantially increases the risk of non-payment to creditors. The unacceptable result may be manifested either through transfers of existing property rights, whether direct or indirect, complete or partial, secret or public,

> or by the assumption of obligations which do not result in a concomitant benefit to the debtor and therefore to his creditors. *These principles do not interfere with the debtor's legitimate operation of his business or conduct of his affairs; they only demand that he be reasonably compensated for the value he gives.* They examine the totality of assets convertible into cash and available to creditors for the repayment of these obligations, before and after the dubious transaction. To the extent of the prejudice to creditors the transaction may be voidable, subject to the intervening rights of innocent third parties.
>
> The fraudulent conveyance laws in most of their manifestations *do not relate to a creditor's right or ability to look to a particular asset for repayment. Rather, the principles are designed to assure that the creditor body has available for repayment a totality of value which the debtor had, or led the creditor body to believe he had, before the questionable transaction."* [emphasis added].

This summary highlights the folly of applying the statutes to a valid foreclosure sale. A lender who gives a debtor money in exchange for a promissory note equal to the loan which is secured by a deed on the debtor's property has voluntarily bargained his position with the debtor: He may collect his debt from the assets of the debtor which are secured. The collection procedure entails the sale of the assets via a statutorily regulated process. Thereafter, the "totality of value" which the "creditor body" can look to for repayment of the "body's" unsecured loan includes the equity which the debtor may have in the secured assets, but subject to the right of the secured creditor to force the sale of that property in satisfaction of the secured creditor's loan. Accordingly, the "totality of value" is measured by the asset encumbered by the danger that it may be eliminated

from the creditor's reach by foreclosure sale. The debtor's only rights in the property are equitable title, right of possession, and right of redemption. No unsecured creditor can claim to be defrauded by this transaction. He is deemed to know the consequences of the transaction by virtue of the public recording statutes and the law of foreclosures. He allows himself to become an unsecured creditor of such a debtor with his eyes open. His alternative is to not deal with the debtor or, if possible, to become secured himself. California statutes make it clear that such a transaction is not a "fraudulent conveyance". There is nothing in the Bankruptcy Code which prevents a similar conclusion, i.e., the Bankruptcy Code should be interpreted in light of past precedent and in harmony with state statutes from which the federal rule is drawn.

II. The Nonjudicial Foreclosure Process in California.

Since this matter arose in California, it is appropriate to review California's foreclosure process.

A. The Procedure.

Nonjudicial foreclosure in California has existed since the early days of statehood and has long been recognized as an efficient, expedient, and appropriate means of realizing upon real property security in the event of default by the borrower. (*Koch v. Briggs*, 14 Cal. 256 (1859).) California courts have consistently upheld the process as an appropriate and integral part of the real property security law. (*Garfinkle v. Superior Court*, 21 Cal.3d 268, 146 Cal.Rptr. 208 (1978).)

State law statutes and court opinions have carefully balanced the rights of the borrower, the lender, and of the trustee under the deed of trust. (*I.E. Associates v. Safeco Title Ins. Co.*, 39 Cal.3d 284, 288, 216 Cal.Rptr. 438 (1985).)

Procedurally deficient, fraudulent, or collusive foreclosure sales are strictly scrutinized and can be set aside under California law. (CEB, *California Mortgage and Deed of Trust Practice*, (2d Ed. 1990) "Debtor Strategies", § 6.40, pp. 319-320, herein, "CEB Mortgage Practice".) The fact that the amount bid is less than the property's market value, however, is not a sufficient ground to set aside the sale in the absence of fraud, unfairness, or oppression. (*Id.*, at p. 320.) A gross disparity between price and value empowers the court to set aside the sale if there is any evidence of unfairness or irregularity. (*Id.* at p. 320.)

Where the terms of the power of sale in the deed of trust and of the applicable statutes have been complied with, a non-collusive, nonjudicial foreclosure sale, untainted by fraud, is conclusive and cannot be set aside. (See, Civ. Code § 2924.) The rights and powers of trustees in nonjudicial foreclosures have long been regarded as strictly limited and defined by the contract of the parties and by the statutes. (*I.E. Associates, supra*, at p. 287.) The clear and important policy of the State of California, as enunciated by the California Supreme Court in *I.E. Associates, supra*, p. 288, (and most of the other western states which employ the deed of trust concept), is as follows:

> "In short, there is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed and the statutes. There are, moreover, persuasive policy reasons which militate against a judicial expansion of those duties. *The nonjudicial foreclosure statutes – an alternative to judicial foreclosure – reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees.* Beneficiaries, of course, want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors, on the other hand, need protection against the forfeiture of valuable property rights. Trustees, the middlemen,

need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation. In taking all of these concerns into account, the statutes strike an overall balance favoring the protection of trustors." [cites omitted; emphasis added].

B. Nonjudicial Foreclosure in California is Created by Contract and Substantially Restricted by Statute.

Nonjudicial foreclosure is only permitted in California where the security document (e.g. deed of trust) contains an express "power of sale" authorizing such a procedure. (*Huene v. Cribb*, 9 Cal.App. 141, 98 P. 78 (1908); and Civ. Code §§ 2920 et seq.) The contractual power of sale is restricted by numerous statutes. (*Id.*) The statutes and the deed of trust form the exclusive source of the parties' rights, duties, and liabilities. (*I.E. Associates, supra*, at pp. 285-288.) A brief outline of the scheme of regulation will show just how the California legislature has attempted to balance the rights, responsibilities, and risks between the parties to a real property secured transaction.

1. The Nature of the Deed of Trust. The deed of trust is a three-part instrument whereby the trustor conveys legal title to the trustee for the benefit of the beneficiary to secure an obligation owed by the trustor to the beneficiary.[5]

2. Notice of Default. To initiate a nonjudicial foreclosure upon default, the trustee, beneficiary, or other

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[5] Although the deed of trust is the most frequently used real property security device in California, any security instrument with a power of sale may be foreclosed nonjudicially. (Civ. Code § 2920).

authorized person must first record and mail a notice of default to the borrower (trustor) and to certain other persons entitled to notice (e.g., beneficiaries of junior deeds of trust.) (Civ. Code §§ 2924, 2924b.) The content and form of the notice is set forth by statute. (Civ. Code §§ 2924b & 2924c.) The persons to whom such notices of default are to be sent, the method, and timing of mailing are all set forth in detail in the Civil Code. (*Id.*)

3. Notice of Sale. Before a nonjudicial foreclosure may take place, a minimum of three months must pass after the recording of the notice of default. (Civ. Code § 2924). Thereafter, a notice of trustee's sale must be published once a week for three weeks, posted on the property and in a conspicuous public place, recorded, and mailed to the same persons who were entitled to receive notice of default. (Civ. Code §§ 2924b, 2924f.)

4. Reinstatement and Redemption Rights. Many common-law jurisdictions, including California, have adopted the "equity of redemption" by statute as well as statutory rights to redeem prior to the foreclosure sale. (Civ. Code §§ 2903-2905, § 2924c; Osborne, *Mortgages*, (West 2d Ed. 1970) § 8 pp. 17-19.)

Civil Code § 2924c (i.e., the cure provision) is but one provision in a series of statutes added during the Great Depression as a mortgage foreclosure moratorium law. The purpose of these moratorium statutes was to alter the contractual rights between the debtor and the creditor to provide extensions of time and to give the debtor an opportunity to cure his default if done within a designated reinstatement period. (See, *Schmidt v. Klipfel*, 59 Cal.App.2d 197, 200-202 (1943); stats. 1933, c. 642; Civ. Code § 2924c(e).) The right to reinstate may now be made at any time within the period from recordation of the notice of default until five business days prior to the date of the trustee's sale. (Civ. Code § 2924c(e).)

5. Costs, Expenses and Trustee's Fees. Foreclosure trustee's fees, costs, and expenses which can be charged in a nonjudicial foreclosure are strictly limited by statute. (Civ. Code §§ 2924c(c)&(d) and 2924d.)

6. The Sale. The Civil Code specifies the time and place for nonjudicial foreclosures; who may postpone, under what circumstances, and how postponements are declared; the order of sale of multiple parcels absent contrary authority in the deed of trust; and how to handle sales of property located in more than one county. (Civ. Code §§ 2924g and 2924h(d).)

7. The Anti-Deficiency Statutes. California's anti-deficiency statutes minimize the likelihood of any post foreclosure personal liability for the borrower. (Code of Civ. Proc. §§ 726, 580a, 580b and 580d.) The thrust of California's anti-deficiency provisions are several fold: a) if the creditor wants an economical and quick (minimum of 111 days) resort to the security via nonjudicial foreclosure, he must eschew a deficiency altogether (Code of Civ. Proc. § 580d); b) if the creditor seeks a deficiency judgment, the creditor must use the more cumbersome, time consuming, and expensive judicial foreclosure process (Code of Civ. Proc. § 726); and, c) a deficiency may not be obtained where the deed of trust is purchase money regardless of whether judicial or nonjudicial foreclosure is utilized. (Code of Civ. Proc. § 580b.) Even in the rare instance where a deficiency judgment can be obtained, it would be limited to the difference between the debt and the "fair value" of the property as determined by the court in a fair value hearing. This encourages the creditor to bid up the property to its fair value as that amount will be a floor used in determining any potential deficiency.

The California nonjudicial foreclosure system has long been recognized as a balanced system which, on the

whole, functions well for all parties to the secured real property transaction. The California courts have left the imposition of new and additional requirements relating to the nonjudicial foreclosure of deeds of trust to the Legislature. (*I.E. Associates, supra,* at pp. 288-289.)

C. The 9th Circuit and Congress Have Recognized That Consonance Between State Foreclosure Law and Bankruptcy Law is Critical to the Stability of Titles and the Lending Industry.

Bankruptcy law, as developed over recent years in the 9th Circuit and in Congress, has recognized the importance of the state's nonjudicial foreclosure process, its place in the real property security scheme, and the need for continuing its stability and the stability of land titles.

Based upon the foregoing recognition, a valid foreclosure sale cannot be set aside, under the better reasoned bankruptcy law decisions. In balancing the purposes of the nonjudicial foreclosure process with the purposes of the fraudulent conveyance law, an attack on a foreclosure sale under § 548 cannot stand. It is appropriate to balance the policy concerns behind the issues facing the Court.

The Bankruptcy Code is not so clear on its face that policy concerns cannot be taken into account. For example, in *Kupetz, supra,* the 9th Circuit makes it clear that § 548 is not to be applied to legitimate business transactions that may technically fall within its parameters. (*Id.*, at p. 847.) While the court recognized that lack of fraudulent intent does not bar a fraudulent conveyance claim, it declined to utilize constructive intent to frustrate the purposes intended to be served by the legitimate business transaction before it. (*Id.*, at p. 848.)

Similarly, this case involves a legitimate secured lender/borrower transaction. There is no hint of fraud,

collusion or improper practices. Accordingly, it is difficult to rationalize why this legitimate business transaction, above board and of public record, should be set aside as a fraudulent conveyance. (See, *Kupetz* at p. 849, fn. 16.) Many courts have recognized the importance of the stability of titles and the detrimental economic effect of applying the fraudulent conveyance law to the foreclosure statutes. (See, *In re Lindsay, supra,* at p. 989, fn. 7.) While *Lindsay* cites Shuchman Data for statistics contrary to the concerns found in the footnote cases, the Zinman Data article throws considerable doubt on the Shuchman Data study and is not cited in *Lindsay*.

III. Prior to *Durrett*, No Case in the 400 Year History of the Fraudulent Conveyance Laws Has Set Aside a Nonjudicial Foreclosure Sale in the Absence of Actual Fraud or Collusion. In the Absence of Congressional Indication to the Contrary, a Statute will not be Interpreted to Repeal a Common-Law Doctrine.

One of the most interesting statements in Zinman, at page 584, is his response to Professor Kennedy's conclusion that applying the fraudulent conveyance law to valid foreclosure sales is "not so novel." Professor Zinman replies that "[n]one of the cited cases overturning foreclosures deals with valid foreclosure sales. [fn. 19]. The cases involving foreclosure sales cited by Professor Kennedy . . . invariably disclosed some kind of collusion." In fact, Zinman states:

> "The point, of course, is that the concept of intent was not being read out of the statute. On the contrary, the purpose of the badges, presumptions, and finally the constructive fraud provisions was to develop methods of ferreting out those transactions that are inequitable to creditors by the debtor's deliberate design or

> indifference. *Noncollusive*, regularly conducted foreclosure sales, nonfraudulent by definition, were not within the 'mischief' for which the statute was written, and thus, until *Durrett*, courts did not apply fraudulent conveyance laws to these sales."

(Zinman, at p. 584.) As a matter of statutory interpretation, when there is no indication that Congress intended to abolish a well-established common-law doctrine through the passage of a statute, the act will be interpreted in a way that will preserve the common-law doctrine. (Sutherland, *Statutory Construction*, (4th ed.) § 61.03, p. 190.) For the purpose of this rule, "common law" should be understood to carry its broadest meaning of the existing body of law, rather than the narrower definition of an ancient body of Anglo-American judge-made principles. (*Id.*, § 61.01, p. 173.)

The plain result should be here, as it has been in the 9th Circuit both before and since *Madrid* (BAP), that there is no fraudulent conveyance in a valid foreclosure sale under state law. Such sales simply do not come within the purview of the statute.

IV. The Effect of the BAFJA Amendments Redefining "Transfer" and Adding "Voluntary or Involuntary" to Transfers Subject to § 548 Merely Restated What the Law Was.

Zinman states, and Kennedy agrees, that the effect of BAJFA was to restate the law as it then existed. (Zinman, p. 582.) "Thus, the amendments were effective only in overcoming the more extreme voices claiming that a foreclosure was not a transfer at all for the purposes of section 548". (*Id.*) Zinman is recognizing that *Madrid* (9th Cir.) went too far when it held that a foreclosure sale did not constitute a transfer. Clearly, a foreclosure sale does constitute a transfer of an owner/debtor's interest in real

property.[6] However, Professor Zinman makes it clear that the BAFJA **DID NOT** change decisions holding that valid foreclosure sales constitute reasonably equivalent value. (*Id.*, pp. 582-583.) (See, also, the Uniform Fraudulent Transfer Act which so provides and Civ. Code § 3439.08(e)(2).)

BAFJA should only be construed as giving a bankruptcy trustee the power to set aside foreclosure sales which are otherwise infirm. A devious debtor could conjure up a fraudulent deed of trust with the purpose of allowing the property to be foreclosed and transferred to a conspiring beneficiary. This type of transaction could be set aside under § 548. The need to have foreclosure included in the definition of transfer is obvious for this purpose. However, there is no need to read into the amendments an intention to invalidate legitimate loan transactions under the definition of "fraudulent conveyance".

Petitioner and its advocates claim that § 548 must be interpreted according to its plain meaning and its purpose, asserting that there is no exception in § 548 for valid foreclosure sales. They define § 548's purpose as: 1) giving the debtor a fresh start; 2) giving effect to the trustee's power to avoid; and 3) providing for the equitable distribution of the debtor's estate to all creditors. (BFP Amici, p. 8.) Respectfully, petitioner and BFP Amici are incorrect in their statements. The purpose of § 548 is to allow the trustee to avoid the debtor's transfers which have historically been suspect and fraudulent, thereby undoing the debtor's transactions which remove assets

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[6] The "interest", however, is limited to the debtor's right of redemption, equitable title and right to possession. *Ehring* (9th Cir.) at pp. 187-188.

from the "creditor body's" reach. Its purpose is not to upset legitimate business transactions.

Section 548 cannot be interpreted in a vacuum. There is a long and revered history of the statute as interpreted in both state and federal case law. This history cannot be ignored in determining whether valid foreclosure sales can be set aside.

V. Improper Focus Has Been Placed on Perceived "Evils" of the Foreclosure Procedure. The True Focus Should Be on the Debtor and the Debtor's Obligations.

The foreclosure laws of the states have been developed locally with local priorities, values, and enforcement procedures in mind. Those who propose using the fraudulent conveyance statutes to attack state foreclosure processes (never before done in history) are really seeking to impose a nationwide foreclosure system with a federally imposed right of redemption. Unsuccessful in their agenda at the state level, these advocates wish to bypass the long history of comity between state and federal law and impose procedures on state foreclosures which would have to be followed to make foreclosure sales firm under federal bankruptcy laws.

These advocates would "bring far more cost and uncertainty into the system". (*I.E. Associates, supra.*) They would impose their "policy" of "commercially reasonable" procedures on the nonjudicial foreclosure process. (*Lindsay, supra,* and *Bundles, supra.*) They would require an appraisal of the security at the time of the foreclosure, unspecified steps to encourage more bidding, and additional advertising beyond that required by state law. (*Bundles, supra,* at p. 824.) Certainly, "litigation would be likely any time a person" felt that the steps taken in the foreclosure process in attempting to be "commercially

reasonable" were insufficient, "since one could always argue that the steps taken were insufficient". (*I.E. Associates, supra*, at p. 288-299.) Such extra cost and services are not recoverable by trustees and beneficiaries under California law thereby disturbing the carefully crafted balance established by the California legislature. (Civ. Code §§ 2924c(c)&(d) and 2924d.)

On the contrary, compliance with the existing statutes mandates a valid and final foreclosure sale. All parties know their rights, duties, and liabilities under the statutes. There is no way to engraft the "commercially reasonable" procedures standard of *Bundles* and *Lindsay* or the "70% rule" of *Durrett* on to the California nonjudicial foreclosure scheme. These cases leave the hows, whos, wheres and whys unanswered. For example, there is a failure to set forth how the parties are to be compensated for these efforts and additional costs. In California, trustee's fees and costs are strictly regulated and limited by statute. (Civ. Code § 2924c(d).) Who is to pay for the advertising, the appraisal, and the steps to encourage "competitive bidding" over and above those steps set out in the statute? How is it possible to determine the "70% rule" when appraisal is an art, not a science, particularly in commercial properties where appraisals can vary widely? (Zinman, at p. 594-595.)

Finally, these advocates do not explain why the nonjudicial foreclosure process is to blame for the perceived ills, when the trustor, the one with the most to lose, should be undertaking "commercially reasonable" efforts to sell or refinance the property. If the owner cannot take these steps in a timely fashion, why should an innocent lender or trustee be required to do so when that was not part of the contractual bargain?

VI. While Professing to Eschew Policy Concerns, *Bundles, Durrett,* and other Similar Cases Create New, Unprecedented Policy of Dubious Value and of Great Mischief.

The adverse results of adopting the *Bundles* or *Durrett* standard in addition to the already existing statutory foreclosure procedures are monumental, but include:

1. the difficulty, if not impossibility, in obtaining marketable and insurable title following a foreclosure sale;

2. the long statute of limitations to which a foreclosed property would be subject, thus rendering title unstable for years; [one year (§ 548(a)) plus two years after a bankruptcy is filed (§ 546(a))];

3. the uncertainties and increased, uncompensable costs in the foreclosure process, decreasing or eliminating the viability of the foreclosure trustee business, and pushing many private (i.e., "mom and pop") lenders, often the lenders of last resort to troubled debtors, out of the market;

4. the encouragement of bankruptcy filings to obtain a heretofore unheard-of nonjudicial foreclosure redemption right;

5. the reduced competitive bidding at foreclosure sales, actually reducing or eliminating overbids and any possible recovery for the debtor, junior lienholder, and/or the bankruptcy estate;

6. the long and expensive litigation over the inherently uncertain standards proposed by *Bundles*.

Bundles would require parties enforcing their real property security interest: (1) to obtain an appraisal of the property; (2) to advertise the property widely beyond that required by state law.

Chief among the Association's many concerns is that none of these efforts can be shown to actually encourage

bidding at a sale. The only real result from such efforts, besides raising nonjudicial foreclosure costs, will be to increase bankruptcy filings and litigation over what efforts were (or should have been) taken.

Parties who bid at foreclosure sales provide a valuable service to the trustor, the beneficiary, and the secured lending industry in general. (*In re Verna, supra.*) There are many publications which are subscribed to by parties interested in bidding at foreclosure sales which summarize notices of default and notices of trustee's sales from the recording offices and circulate them to their subscribers. There already exists a product to advertise foreclosure sales to those parties who are truly interested in such sales and who have the ability to purchase. It is not necessary to require further advertising.

With regard to advertising the property widely, it is inconceivable that an owner of property with any equity has not taken some steps to either refinance the obligation and/or to voluntarily market his property before it is lost to foreclosure. Real estate brokers often circulate the properties to other brokers and to the public, either via the Multiple Listing Service or through other advertisement. In addition, the trustor has an advantage in marketing his property that the beneficiary and foreclosure trustee do not have; that is, the ability to provide ready access to the property and to sell the property on terms other than all cash. If a property with any real equity cannot be sold through the customary, voluntary listing, and marketing process, it is unclear how further advertising a sale at which all cash is required to bid can bring any more bidders. Again, such a requirement would do little, if anything, to generate bidders at foreclosure sales.

Further, as indicated by the California Supreme Court in *I.E. Associates, supra,* the efficacy of the system supports striking the balance in favor of requiring the

trustor to take the steps now imposed by *Bundles*. There is no reason why the secured lender should be so burdened with uncompensable costs, fees, and expenses.

Among other of the concerns of Association are the following:

1. Who is to pay for these efforts? The trustee? The beneficiary? The trustor? The California Civil Code does not allow a beneficiary or trustee to collect charges for such additional costs. (Civ. Code § 2924c(c).)

2. What possible benefit is an appraisal of the property? How does that add to increasing the bidding at a foreclosure sale? How is a trustee or beneficiary supposed to gain access to the property to prepare a valid appraisal? Who is responsible for giving any information contained in an appraisal to a third party bidder if the information is incorrect? Foreclosure sales as they stand now are "as is, where is" as to both title and physical condition. (CEB, *Mortgage Practice,* § 2.23, p. 82; see, Civ. Code § 2924h(g).)

Balancing the results which could be achieved from the efforts required by *Bundles* and *Durrett* with the monumental problems created by such a requirement leaves little doubt that these decisions should not be followed.

VII. BFP Amici make several arguments which do not hold up under scrutiny.

A. BFP Amici argue that existing state foreclosure laws do not contain protections ensuring that the debtor's estate obtains appropriate value as a result of a foreclosure sale.

BFP Amici argue that state foreclosure procedures do not contain protections which would ensure that the debtor's bankruptcy estate will obtain value for foreclosed property. (BFP Amici, p. 41.) Firstly, it is not the

purpose of § 548 to generate value for the debtor's estate. Its purpose is to undo fraudulent transactions which put valuable assets out of the reach of legitimate creditors. Secondly, it is not the purpose of security interests and foreclosure laws to generate value for the debtor. The purpose is to pay back the secured lender for value given to the debtor. It is the debtor's job to sell the property to realize equity. If the debtor is in financial distress, the property should be sold. Any realizable equity can be recovered far more easily by the debtor in a sale listed with a real estate broker and actively marketed than in any foreclosure proceeding regardless of how the foreclosure laws are written. Again, what the BFP advocates are seeking is to judicially legislate federal foreclosure laws and a federal right of redemption under state foreclosure laws and to unify procedures the states must follow in order to allow their citizens to realize upon their bargained for security. This is not the job of the federal courts or government.

B. Foreclosure sales are regularly advertised in such a fashion that anyone seeking to purchase at such sales can do so.

BFP Amici argue that foreclosure sales are rarely advertised in a manner designed to attract bidders because the mortgagee is usually only required to advertise in legal columns of local newspapers. (BFP Amici, p. 44.) These legal columns usually consist of several columns of advertisements as opposed to regular ads for properties which may only consist of several lines. Anyone seeking to buy such properties has adequate notice of the sale. California requires publication once a week for three weeks before a sale can occur. (Civ. Code § 2924f.)

C. No evidence exists that either mortgagees or bidders at foreclosure sales regularly receive windfall profits. The evidence is to the contrary.

BFP Amici argue that only a small group of speculators appear at foreclosure sales and purchase the properties for very low prices, that lack of active competitive bidding frequently results in purchase of the property by the foreclosing mortgagee at a nominal price, and the bidding results in a windfall to the bidders. (BFP Amici, p. 45.) Such claims are not supported by the empirical evidence. On the contrary:

> "The results of the empirical study, however, do not support Professor Kennedy's windfall theory. Indeed, the results show that the mortgagee suffers a loss on resale of foreclosed properties generally, and especially in connection with the resale of commercial properties. (fn 67: The results [of the study] showed, inter alia, that all resales of foreclosed properties, both residential and commercial, produced an average loss of almost $14,000 per property. Almost half the cases involved "profits" of between $2,000 and $10,000 (over 70% of which were single-family homes, which means that losses on commercial properties were greater than the average) and half involved losses of between $2,000 and $15,000. The mortgagee was made whole in only 44% of the cases. Actually these figures do not reveal the true extent of the mortgagee's loss because profit was determined by comparing the total amount due the mortgagee on foreclosure with the resale price. Apparently not included were lost opportunity costs, maintenance expenses, repairs, brokers' fees, etc., all of which will increase the mortgagee's loss.

"The survey also revealed that third parties bought at foreclosure sales about 25% of the time, a larger percentage than critics have suggested. They found several indications that third parties bought the best properties, 'leaving the abused or neglected properties for mortgagees to purchase.' *Id.* Additionally, they concluded that local 'bank officials and their counsel, who work with mortgage foreclosures and the management and resale of properties acquired in foreclosure, appear to sincerely believe that 'lenders always lose in foreclosures.' This may be because, when taken as a group, losses do outweigh gains. . . .

"The results of the study make sense. Why would an owner with the slightest degree of sophistication allow commercial property to go into a foreclosure sale if the value of the property exceeds the amount of the mortgage? The value of real estate is what a person will pay for it, and if an owner of commercial property in financial difficulties knows there is substantial equity in the property, the owner will sell the property and realize upon that equity long before foreclosure.

"That a commercial property goes into foreclosure and is sold at a foreclosure sale for no more than the mortgage balance is an indication that unbiased third parties, using the same economic valuation method that will be employed by a bankruptcy court, do not see any substantial equity in the property. The attention focused upon 'workouts' and the growing law of lender liability are but two indications of the fact that lenders do not look at foreclosures as a source of huge profits, but prefer to work with the borrower to put the loan back on a paying basis. The canard of lender windfalls on foreclosure

continues unabated and seems directly to influence supporters of the *Durrett* rule."

(Zinman, at pp. 598-599.)

D. Mortgagees do have incentive to bid at foreclosure sales and almost never receive a double recovery in the form of a deficiency judgment.

BFP Amici argue that a mortgagee has no incentive to bid fair market value and often only bids a nominal amount because he can obtain market value upon resale, resulting in a double recovery, i.e., he obtains the property and can subject the mortgagor to a deficiency judgment. (BFP Amici, p. 46-47). Firstly, California's anti-deficiency rules prohibit a deficiency after a nonjudicial foreclosure. (Code of Civ. Proc. § 580d.) Therefore, the foreclosing beneficiary is limited to taking the security or accepting whatever amount is bid by a successful outside (competitive) bidder in complete satisfaction of the secured obligation. Bidding is encouraged and incentive exists to do this. In a judicial foreclosure, the amount of the deficiency is limited by the fair value of the property. (Code of Civ. Proc. § 726.) Further, the Wechsler[7] study cited by Zinman, *supra*, demonstrates that in only one of ninety-four cases was a deficiency judgment obtained and in that case the judgment was not satisfied. (Wechsler, p. 878.)

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[7] Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure – An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 Cornell L. Rev. 850 (1985).

E. Competitive bidding does exist on properties with sufficient value to warrant such bidding.

BFP Amici argue that historically the typical foreclosure sale has produced very little in the way of competitive bidding, citing Skilton. (BFP Amici, p. 51.) Skilton is a 1942 law review article (post-depression) which can hardly be cited as authority for the effect of current foreclosure laws which have been frequently amended in the past fifty-one years. On the contrary, the Wechsler study shows that competitive bidding exists about 25% of the time and that the remaining sales were probably of properties which were over encumbered, neglected, or abused. (Zinman, at p. 598, fn. 67.)

F. Allowing § 548 set asides will increase the cost of mortgage lending.

BFP Amici assert that there have been no negative effects from *Durrett* and no destabilizing effect on the mortgage market, citing the Shuchman Data. The Zinman Data expresses the doubtful nature of the Shuchman Data's conclusions given its reliance solely on residential mortgage statistics to the exclusion of commercial mortgages; its inconclusive and misleading results; its assumption that mortgage lending officers and their real estate lawyers will react quickly to lower court bankruptcy decisions; and its implicit assumption that the costs and risks of lending do not affect the cost of borrowing and the availability of financing. The Zinman Data article sets forth the reasons for doubt and then his basis for concluding that mortgage lending costs will increase if *Durrett* type decisions are imposed nationwide.

VIII. Billions Of Dollars Of Second Mortgage Capital Would Be Endangered Should Foreclosure Sales Be Subject To Set-Aside For Up To Three Years After They Occur.

The second mortgage market consists in large part of lenders who are private investors often investing savings and retirement funds (e.g., IRA'S and pension plans). Investments by these individuals fund the billions of dollars in loans often to the very borrowers who need money the most (i.e., those with prior credit problems, marginal equity, or a with history of defaults)[8]. These investors invest because of higher returns and expect some higher risks than are involved with high quality, first deeds of trust with institutional lenders. However, a risk of having to defend fraudulent conveyance lawsuits and of having the investment tied up for years will be sufficient to dry up this private money market as private investors will look for a safer place to invest their retirement savings.

CONCLUSION

The well-reasoned thoughts of Professor Zinman are appropriate in closing:

> "[M]ortgage foreclosures are not the demons they are painted to be. The history of the mortgage law has seen a long series of tradeoffs as equity courts and legislatures developed procedures to balance the rights of the lender and borrower. The rules that go into making that balance are not the same in each jurisdiction. It would seem, however, that some reasonable credibility should be given to each state's determination of what that balance should be, given the circumstances that exist in that jurisdiction.

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[8] It can be concluded from a recent California Department of Real Estate report that mortgage brokered loans in California amounted to over $16,000,000,000.00 in 1990.

> It is not, in any case, the function of the federal Bankruptcy Code to attack collaterally what one does not like in state law. Using the Bankruptcy Code for something it was not intended to do can only result in adverse consequences to the well-ordered administration of bankruptcy and the smooth functioning of the economy of the nation."

(Zinman, *supra*, at p. 603.)

The result sought by Petitioner and BFP Amici would turn on its head over 400 years of precedent interpreting the fraudulent conveyance laws, precedent in the 9th Circuit, and the precedent of logic. They would upset the reasoned balance now existing between the important and carefully crafted policies of the states regarding the enforcement of real property secured liens and the need to protect unsecured creditors from the nefarious activities of their debtors. No solid and corroborated basis for their positions exists in the evidence before the Court. To the contrary, rather than assist unsecured creditors, the result will be to depress foreclosure sale bidding, cloud real property titles for years, and spawn untold needless litigation and bankruptcy filings. The decision of the 9th Circuit Court of Appeals should be affirmed.

Dated: August 20, 1993

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In The

Supreme Court of the United States

October Term, 1993

BFP,

Petitioner,

v.

Resolution Trust Corporation, As Receiver for Imperial Federal Savings Association, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Courts of Appeals
For the Ninth Circuit

[redacted]

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QUESTION PRESENTED

Whether the consideration received from a noncollusive foreclosure sale that is conducted in conformance with applicable state law constitutes "reasonably equivalent value" under 11 U.S.C. § 548(a)(2)(A).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1370

BFP,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR IMPERIAL FEDERAL SAVINGS ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The interpretation of 11 U.S.C. § 548(a)(2)(A) urged by petitioner would effect a significant displacement of state law

governing foreclosures. Because the authority to govern property transactions and to define property relationships has always been a critical component of state sovereignty, *amici* have an interest in protecting the States' traditional role in this area.

Moreover, *amici* have a broader interest in the development of jurisprudence governing the interpretation of both the Bankruptcy Code and other federal statutes in light of state interests and existing state law. In accordance with this Court's precedents, the Ninth Circuit correctly chose an interpretation of Section 548 which is consonant with state law, rather than one which would unnecessarily intrude on traditional state functions. *Amici* submit that the alternative readings of the statute adopted by other courts fail to take into account the federalism concerns with which this Court has traditionally imbued its interpretation of federal law where the displacement of state law in an area historically committed to state control is at issue. *See, e.g., CSX Transportation, Inc. v. Easterwood,* 113 S.Ct. 1732, 1737 (1993).

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

Amici adopt the federal respondent's statement of the case.

SUMMARY OF ARGUMENT

1. This Court has clearly established that where a law enacted by Congress is alleged to conflict with the laws of the States, analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). This precept is constitutionally required to "avoid[] unintended

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

encroachment on the authority of the States," where, as here, the federal statute "pertain[s] to a subject traditionally governed by state law." *CSX Transportation, Inc. v. Easterwood,* 113 S.Ct. 1732, 1737 (1993).

Petitioner's interpretation of Section 548 would effect a significant displacement of state law governing property rights, an area that has traditionally been left to state control. Based upon a balancing of competing private property interests, state law has long prescribed foreclosure sale procedures and set forth the conditions for a foreclosure sale's validity and finality. Reading a federal standard of price adequacy into Section 548 would override these state laws, which almost universally prohibit setting aside a sale solely because the price is inadequate. *See, e.g., Matter of Winshall Settlor's Trust,* 758 F.2d 1136, 1139 (6th Cir. 1985).

Section 548, which, as its heading states, is aimed solely at the avoidance of "fraudulent transfers and obligations," allows a transaction to be avoided as constructively fraudulent where "less than a reasonably equivalent value" was received. 11 U.S.C. § 548(a)(2)(A). Section 548 lacks the "clear and manifest" expression of congressional intent which would be required to effect the encroachment into an area of traditional state authority advocated by petitioner. *See, e.g., Cipollone v. Liggett Group, Inc.,* 112 S.Ct. 2608, 2617 (1992) (citation omitted). There is absolutely no indication in the language of the provision or in its legislative history that Congress intended for Section 548 to displace state foreclosure law with case-by-case determinations of reasonable equivalence by federal bankruptcy courts, or that it intended for foreclosure sales valid under state law to be undone for their failure to meet a federal bankruptcy court's standard of price adequacy.

Accordingly, the Ninth Circuit correctly adopted a less intrusive construction of Section 548 which harmonizes with existing state foreclosure law. Given Congress's fail-

ure to attach any fixed meaning to the inherently ambiguous phrase "reasonably equivalent value," defining that statutory language as the sale price obtained in a foreclosure sale conducted in full accordance with state law is unquestionably a permissible construction. Indeed, the price which a property actually brings in a properly conducted, noncollusive foreclosure sale provides the best available measure of its "value" under such circumstances.

Moreover, because the Bankruptcy Code is superimposed upon a complex network of preexisting state law, *see Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 171 (1946) (Frankfurter, J., concurring), the underlying state law properly gives defining content to concepts found within that scheme, absent conflict with a federal interest. *See Butner v. United States,* 440 U.S. 48, 56 (1979) (adopting rule which "looks to state law to define the security interest of the mortgagee"). In analogous contexts, the Court has often resorted to state law to provide operative standards within a federal statutory scheme, where the creation of a federal rule would have the effect of overriding a traditional area of state authority. *See, e.g., De Sylva v. Ballentine,* 351 U.S. 570, 580-81 (1956).

Nor is a more disruptive interpretation required to effectuate the federal policy underlying Section 548—the protection of creditors from the diminishment of the bankrupt's estate through fraudulent conveyances—since state law and Section 548 share this goal. Because state foreclosure laws are designed to guard against fraud and collusion, Section 548's fraud prohibition is effectuated by compliance with those laws; there is no need for judicial second-guessing as to whether the price received in a foreclosure sale was "reasonably equivalent." Significantly, the policy of protecting creditors from fraudulent transfers has been codified for many centuries; yet prior to *Durrett v. Washington National Insurance Company,* 621 F.2d 201 (5th Cir. 1980), courts had not even considered the

idea that a foreclosure sale conducted in accordance with law could be invalidated as fraudulent.

In sum, the Ninth Circuit's interpretation—that the price received at a foreclosure sale conducted in full accordance with state law is, as a matter of law, one for "reasonably equivalent value"—accords with the language and purpose of the statutory provision, as well as with this Court's admonition that the Bankruptcy Code be read in light of overarching federalism concerns. *See, e.g., Kelly v. Robinson,* 479 U.S. 36, 49 (1986).

Imposing a federal rule of price adequacy as a measure of "reasonably equivalent value" would upset the balance state law—based on local conditions—has struck between the interests of mortgagors and mortgagees. That such a rule injects added uncertainty into the foreclosure sale process and potentially generates harmful economic effects —such as depressed bid prices, diminished availability of credit, and the like—has been noted by a number of courts and commentators. Even if there is less than complete consensus as to the economic consequences flowing from such a federal rule, the weightiness of the economic factors involved counsels deference to the choices that individual States have made.

While some may disagree with the precise manner in which certain States have balanced the competing interests of debtors and creditors, imbuing Section 548 of the Bankruptcy Code with a meaning not founded on congressional intent represents a misguided, constitutionally unacceptable, and ultimately counterproductive means of seeking to undo that balance. To the extent reform in state foreclosure law is sought, reform efforts should be directed to state lawmakers, not to federal bankruptcy courts.

In addition to the constitutional infirmity of using the Bankruptcy Code to perform an end-run around the state lawmaking process, such an approach is also undesirable

as a matter of policy. Allowing the fact of bankruptcy to trigger the reconsideration and possible avoidance of an otherwise valid foreclosure creates a problematic dual system whereby completed foreclosure transactions are treated differently depending upon whether the parties involved have resorted to the federal bankruptcy courts. Making the finality of a lawfully conducted foreclosure sale turn on the fact of bankruptcy runs directly counter to this Court's concern with "discourag[ing] forum shopping" and "prevent[ing] a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Butner*, 440 U.S. at 55 (citation omitted).

Finally, an unnecessarily intrusive interpretation of the Bankruptcy Code would serve to "reform" state foreclosure law only where foreclosures are followed by bankruptcy; state law would continue to control the finality of those foreclosures which are not followed by bankruptcy. The imposition of an added layer of federal protection for foreclosure sales followed by bankruptcy would make it all the more difficult for States to strike an appropriate balance as to the remaining cases. Indeed, the further development of state foreclosure law would likely be impeded by a rule making those laws largely irrelevant in all bankruptcy cases.

ARGUMENT

THE CONSIDERATION RECEIVED FROM A NON-COLLUSIVE FORECLOSURE SALE THAT IS CONDUCTED IN CONFORMANCE WITH APPLICABLE STATE LAW CONSTITUTES "REASONABLY EQUIVALENT VALUE" UNDER 11 U.S.C. § 548(a)(2)(A).

State foreclosure law almost universally declines to undo a sale for "mere inadequacy of price." *See Matter of Winshall Settlor's Trust*, 758 F.2d 1136, 1139 (6th Cir. 1985) (citation omitted).[2] Consequently, the construction of "reasonably equivalent value" urged by petitioner would necessitate a massive displacement of state law and procedure.[3] Under this Court's well-established principles for construing federal statutes which touch on areas of traditional state authority, such a construction is

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[2] *See also In re Madrid*, 21 B.R. 424, 427 (Bankr. 9th Cir. 1982), *aff'd*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984)); Scott B. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives*, 71 Va. L. Rev. 933, 933 (1985) ("state preferences are reflected in the near-universal principle that a nonjudicial foreclosure sale will not be overturned, nor will confirmation of a judicial foreclosure be denied, because of 'mere inadequacy' in the price received at the foreclosure sale") (footnote omitted).

[3] Petitioner advocates the adoption of either of two alternative approaches to the Ninth Circuit's construction of Section 548(a)(2)(A). *See* Pet. Br. 40-44. One approach stems from the Fifth Circuit's holding in *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980); the so-called "*Durrett* rule" stands for the proposition that a foreclosure sale realizing less than 70% of fair market value is avoidable in bankruptcy as a transfer for less than "reasonably equivalent value." The second approach is exemplified by the Seventh Circuit's holding in *Bundles v. Baker (In re Bundles)*, 856 F.2d 815 (7th Cir. 1988), which mandates a fact-specific, case-by-case analysis under Section 548(a)(2)(A). Both of these constructions supplant state foreclosure law by superimposing a federal test of "reasonably equivalent value" onto the analysis under Section 548. *See, e.g., Madrid*, 21 B.R. at 427 (*Durrett* rule would "radically alter" state law rules).

impermissible where, as here, a less intrusive alternative exists that is fully consistent with the language and purpose of the statute.

A. In The Absence Of A Clear Statement Of Congressional Intent, Federal Legislation Does Not Displace State Law Concerning Matters, Such As Property Rights, Which Have Traditionally Been Subject To State Authority.

A court construing federal legislation in an area historically subject to state authority must begin with the "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981).[4] A finding that a federal statute impinges on "a subject traditionally governed by state law" is permissible only if it is " 'the clear and manifest purpose of Congress.' " *CSX Transportation, Inc. v. Easterwood,* 113 S.Ct. 1732, 1737 (1993) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).[5] This reluctance to find preemption in an area of traditional state control is essential to "avoiding unintended encroachment on the authority of the States." *Id.* Hence, federal statutes that could encroach upon state authority should be given a "fair but narrow reading," *Cippollone v. Liggett Group, Inc.,* 112 S.Ct. 2608, 2621 (1992) (opinion of Stevens, J.); where a statute is susceptible of more than one permissible interpretation, the one least disruptive of traditional state authority should govern.

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[4] *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 539-40 (1947) (federal legislation affecting historic state functions "cannot . . . be construed without regard to the implications of our dual system of government"), *quoted in Kelly v. Robinson,* 479 U.S. 36, 49 n.11 (1986).

[5] *See also Cipollone v. Liggett Group, Inc.,* 112 S.Ct. 2608 (1992); *English v. General Electric Co.,* 496 U.S. 72, 79 (1990); *California v. ARC American Corp.,* 490 U.S. 93, 101 (1989).

This approach reflects the fact that federal law is "generally interstitial in its nature" and designed "to accomplish limited objectives"; hence, "[i]t builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose." Hart & Wechsler's *The Federal Courts and the Federal System* 470-71 (Paul M. Bator *et al.,* eds., 2d ed. 1973) *quoted in* Laurence H. Tribe, *American Constitutional Law* 316 (2d ed. 1988). Nowhere is this more true than in the bankruptcy context, where the federal statutory scheme builds upon a preexisting body of state property law. *See Butner v. United States,* 440 U.S. 48, 54-55 (1979); *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 169-73 (1946) (Frankfurter, J., concurring).

Property law lies at the core of traditional state authority. *See, e.g., Butner,* 440 U.S. at 55 ("Property interests are created and defined by state law."); *Reconstruction Finance Corp. v. Beaver County,* 328 U.S. 204, 210 (1946) ("Concepts of real property are deeply rooted in state traditions, customs, habits, and laws.").[6] Specifically, a State's power to instill stability and certainty as to property holdings within the State and "declare what shall form a cloud on the title to such soil" has long been recognized. *American Land Co. v. Zeiss,* 219 U.S. 47, 60 (1911). "As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government." *Id.* Because of this historic state power to create and control property relationships, a federal scheme is not lightly presumed to displace state property law.

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[6] *See also United States v. Fox,* 94 U.S. 315, 320 (1876) ("The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.").

In *United States v. Brosnan*, 363 U.S. 237 (1960), for example, the Court declined to adopt a uniform federal rule as to divestiture of junior tax liens, noting that "when Congress resorted to the use of [federal tax] liens, it came into an area of complex property relationships long since settled and regulated by state law." *Id.* at 241-42. Justice Harlan, writing for the Court, went on to explain:

> We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement or superimposing on them a new federal rule.

Id. at 242.[7] As the court of appeals recognized, such concerns apply with equal force in this case.

B. The Court Of Appeals Correctly Construed Section 548(a)(2)(A) So As To Not Unnecessarily Disrupt State Foreclosure Law.

Openly acknowledging this Court's well-established principles of statutory construction—and the overarching federalism concerns they embody—the court of appeals correctly construed "reasonably equivalent value" by equating that language with the result obtained in a noncollusive foreclosure sale conducted in full conformance with state law. This construction is consistent both with the language and purpose of Section 548, and with this Court's

[7] The *Brosnan* Court recognized that its conclusion "would not, of course, withstand a congressional direction to the contrary." *Id.* at 242. Indeed, it appears Congress later superseded the *Brosnan* Court's holding by issuing such a contrary directive. *See Elias v. Commissioner*, 1993 U.S. Tax Ct. LEXIS 33, 100 T.C. No. 33 at 16-19 (Jun. 8, 1993) (citing the Federal Tax Lien Act of 1966, § 109, I.R.C. § 7425). This reaffirms the correctness of the *Brosnan* Court's approach in the absence of congressional guidance; if Congress in fact intends to override state law, it, rather than the courts, must supply the needed statutory clarification.

directive that the Bankruptcy Code be read in light of notions of federalism. *See Kelly v. Robinson*, 479 U.S. 36, 49 (1986).

1. A Construction Of Section 548 Which Defines "Reasonably Equivalent Value" In A Manner Consistent With State Law Fully Accords With The Stautory Language And Purpose.

In Section 548, Congress used the phrase "reasonably equivalent value" as a benchmark for the avoidance of certain transfers as constructively fraudulent,[8] but Congress did not define this phrase. In construing this language, two critical factors must be recognized at the outset. First, the term "reasonably equivalent value," like the notion of "value" itself, is inherently ambiguous. *See, e.g., Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 310 (1923) (Brandeis, J., concurring) ("[v]alue is a word of many meanings"), *quoted in Bundles*, 856 F.2d at 823. Second, Congress did not set forth any particular method by which "reasonably equivalent value" is to be determined.

Given these two factors, *amici* submit that a fair but narrow reading of Section 548 that gives appropriate respect to the long tradition of state regulation of foreclosures is, as the court below held, to use the price which a property brings at a noncollusive foreclosure sale conducted in accordance with state law as a definitive measure

[8] Section 548 provides, in pertinent part:

> § 548. Fraudulent transfers and obligations
>
> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> * * * *
>
> (2)(A) received less than a reasonably equivalent value for such transfer or obligation . . . .

11 U.S.C. § 548(a).

of "reasonable equivalence."[9] In many analogous contexts, this Court has looked to state law to supply the definition of an ambiguous term in a federal statute[10] or determine the operative standard within a federal statutory scheme.[11]

But the court of appeals' construction of Section 548 is supported by far more than a due regard for the role

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[9] This reading of the phrase "reasonably equivalent value" is also supported by the fact that the Uniform Fraudulent Transfer Act (UFTA), adopted by over half the States, establishes just such a definition for "reasonably equiavlent value" for purposes of its state law analog to Section 548(a)(2)(A). Uniform Fraudulent Transfer Act, § 3(b), *in* 7A Uniform Laws Annotated 639, 650 (1985 & 1993 Supp.) ("For the purposes of Sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement."). Section 4(a)(2) of the UFTA closely tracks the language of Section 548(a)(2)(A) of the Bankruptcy Code. *See id.* at 653. Twenty-five States have adopted Section 3(b)'s definition of "reasonably equivalent value" as written; three more have adopted it with minor modifications. *See id.*, 1993 Supp. at 170, 175.

[10] *See De Sylva v. Ballentine*, 351 U.S. 570, 581-82 (1956) (term "children" in the federal Copyright Act defined by reference to state law).

[11] *See, e.g., Meyer v. United States*, 375 U.S. 233, 239 (1963) (adopting state rule as to the exemption of a widow's insurance benefits from federal tax lien on her husband's estate "[i]n the absence of a definitive statutory rule to the contrary," citing the "long-established policy" of incorporating state exemptions into bankruptcy law and other federal legislation); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68-71 (1966) (federal Mineral Leasing Act of 1920, which required that oil and gas leases be assignable, did not displace Louisiana law requiring that transfers be made by written agreement); *United States v. Yazell*, 382 U.S. 341, 348-58 (1966) (in seeking to recover balance due on a Small Business Administration loan, federal government was limited by state law of coverture governing a married woman's ability to bind separate property). *See also* Hart & Wechsler's *The Federal Courts and the Federal System* at 493-94 (collecting cases).

of state law in our federal system; the price attained at a lawful foreclosure sale is the most accurate method for determining the value of the property under the circumstances of a forced sale. Because the forced nature of a foreclosure sale depresses the price that will be obtained,[12] the "value" of a property within the context of a forced sale (such as a foreclosure sale or a sale in bankruptcy) will be lower than the value the property might have under different circumstances. Since it is the property's value in the context of a forced sale which is relevant to the "reasonable equivalence" analysis (rather than the hypothetical value the property might have in some other setting), the best—and only—way to arrive at that value is to observe the price a bidder is willing to pay at a noncollusive, lawfully conducted foreclosure sale. *See* Ehrlich, 71 Va. L. Rev. at 964-65 (discussing difficulty of assessing "forced sale price"). Indeed, the court in *Bundles* recognized that "[a]s a practical matter, the foreclosure sale price is the *only* means of measuring the effect of foreclosure on the value of the property." 856 F.2d at 824 (emphasis added).

Hence, the notion that the "value" of a piece of property can be conclusively established apart from the price it actually brings—a concept crucial to the *Durrett* analysis and to the arguments of petitioner and its *amici*—is simply false. The appraisals upon which a bankruptcy court would be forced to base its independent assessment of "reasonably equivalent value" are unlikely to be meaningful indicators of value. As commentators have noted, "[s]ubstituting an appraiser's opinion as to reasonably equivalent value merely results in the court looking to find what an imaginary buyer will pay an imaginary seller under unreal conditions, rather than finding what a real buyer and seller do in real circumstances." Alan S. Gover & Glenn D. West, *The Texas Nonjudicial Foreclosure*

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[12] *See, e.g.*, 1 Baxter Dunaway, *The Law of Distressed Real Estate* § 14.01 (1992) ("Generally property will not sell for as much in a foreclosure sale as it would after a leisurely marketing effort.").

Process—A Proposal to Reconcile the Procedures Mandated by State Law with the Fraudulent Conveyance Principles of the Bankruptcy Code, 43 Sw. L.J. 1061, 1080 (1990) (citing *Gillman v. Preston Family Inv. Co. (In re Richardson),* 23 Bankr. 434, 443 n.12 (Bankr. D. Utah 1982)). Indeed, variations in valuation methodology can yield dramatically different "fair market values" for the same property. *See* Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers,* 9 Cardozo L. Rev. 581, 596 & n.63 (1987) (citing *In re Perido Bay Country Club Estates, Inc.,* 23 Bankr. 36 (Bankr. S.D. Fla. 1982), in which "appraisals considered by the court ran from $7.8 million to $13.4 million").[13]

Significantly, Congress did not choose to use the more exacting phrase "fair market value" in Section 548, as it did elsewhere in the Code.[14] Moreover, Congress never indicated that there was any fixed relationship between the concept of "reasonably equivalent value" and that of "fair market value"; it certainly did not specify any rigid mathematical ratio that would link the two concepts. Hence, there is no statutory support for an approach, such as that used in *Durrett,* which assumes that an immutable mathematical relationship exists between "fair market value" and "reasonably equivalent value." In fact, as Professor Ehrlich has explained, it makes no sense to attempt to draw comparisons between these two very dif-

[13] *See also id.* at 594-95 (*Durrett* approach "tends to ignore the vast understatement that real estate valuation is not an exact science, and to overlook the variables that go into the determination of such values").

[14] *See* Br. of Federal Respondent on Petition at 6 n.3 (citing 11 U.S.C. § 522(a)(2)). As the Solicitor General notes, the concept of "fair market value," which refers to "the value the property would have brought in a transaction between a willing buyer and a willing seller, neither being under any compulsion to buy or sell," could not be applied to a foreclosure sale, since the forced nature of the sale creates downward pressure on the price. *Id.*

ferent kinds of "value." *See* Ehrlich, 71 Va. L. Rev. at 964-65 ("To set about determining, as the *Durrett* courts have, whether sixty or seventy percent of fair market value is reasonable under the circumstances of a forced sale is an inherently arbitrary comparison of two unrelated values.") (footnote omitted).

The legislative history is, like the statute, devoid of any indication of precisely what Congress meant by "reasonably equivalent value." Contrary to the assertions of petitioner, *see* Pet. Br. at 28-29, 44-47, the fact that Congress's 1984 amendment of Section 548 brought foreclosure sales generally within the ambit of avoidable "transfers" by adding the language "voluntarily or involuntarily" to Section 548(a) has no bearing on what it meant by "reasonably equivalent value."[15] The mere fact that involuntary transfers are encompassed within the universe of transfers which may be avoided for failure to realize "reasonably equivalent value" suggests no congressional position as to whether noncollusive foreclosure

[15] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 463, 98 Stat. 333, 378-79 (1984) (codified at 11 U.S.C. § 548(a)). The 1984 Amendments also changed the definition of "transfer" in § 101 of the Bankruptcy Code to clarify that "foreclosure of the debtor's equity of redemption" was encompassed. *Id.*, 98 Stat. at 368, § 421 (codified at 11 U.S.C. § 101(48)).

While this changed language may have overruled the holding of the Ninth Circuit in *Lawyer's Title Insurance Corp. v. Madrid,* 725 F.2d 1197 (rejecting a Section 548 challenge to price adequacy of a foreclosure sale on the grounds that foreclosure sales were not transfers), it did not, contrary to petitioner's assertion, Pet. Br. 29, disturb the holding of the Bankruptcy Appellate Panel in *Madrid.* 21 B.R. 424 (holding that the price obtained at a noncollusive foreclosure sale conducted in accordance with state law is necessarily one for "reasonably equivalent value"). *See In re Verna,* 58 B.R. 246, 251 (Bankr. C.D. Cal. 1986).

sales conducted in full accordance with state law meet that "reasonably equivalent value" standard.[16]

Contrary to the assertions of petitioner and its *amici*, the court of appeals' approach does not draw a distinction between foreclosure sales and other transfers that is at odds with the statutory language or create an "exception" to Section 548 for foreclosure sales. *See* Pet. Br. at 27-28; Br. *Am. Cur.* Frank Allen at 7 (arguing that there is "no exception stating that foreclosure sales are exempt from the avoidance powers of the Trustee"); *id.* at 17, 23. It merely recognizes that foreclosure sales, unlike other transfers, are already subject to a state law process that constitutes the best available means of determining "reasonably equivalent value."

Nor does recognizing this fact render Section 548's inclusion of foreclosure sales meaningless. Where foreclosure sales meet the test of "reasonably equivalent value," they, like other transfers for reasonably equivalent value, simply fall outside the scope of the avoidance powers described in Section 548. However, foreclosure sales which are *not* conducted in accordance with state law, or which involve some other element evidencing fraud, remain voidable under Section 548. *See* 11 U.S.C.

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[16] Nor, contrary to the assertion of petitioner's *amici*, *see* Br. *Am. Cur.* Frank Allen at 30-31, can any congressional position as to the meaning of "reasonably equivalent value" be derived from Congress' failure to adopt a proposed amendment that would have effectively overruled the *Durrett* approach and codified the approach of the *Madrid* Bankruptcy Appellate Panel. As was noted in *In re Verna*, this provision was struck on a point of order by Senator Metzenbaum, who objected because the "issue had not been considered in committee." 58 B.R. at 250; *see* Robert M. Zinman, James A. Houle & Alan J. Weiss, *Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits*, 39 Bus. Law, 977, 980 n.17 (1984). Hence, there is no evidence to support the contention that "Congress thereby refused to overrule *Durrett*." Br. *Am. Cur.* Frank Allen at 30.

§ 548(a)(1) (discussing transfers made "with actual intent to hinder, delay, or defraud").

Hence, nothing in the language or legislative history of Section 548 evinces a clear congressional intent to rule out compliance with state procedures as a proper and sufficient means of establishing "reasonably equivalent value." This Court's precedents indicate that state law should not be displaced in such circumstances unless it would frustrate the statutory purposes Congress was seeking to achieve.[17] *See English*, 496 U.S. at 79. An examination of the purpose underlying Section 548's fraudulent transfer provisions, however, only confirms the advisability of making compliance with state foreclosure law the defining characteristic of "reasonably equivalent value."

Section 548 is expressly directed at undoing fraudulent conveyances; it thus represents the latest in a long line of codified fraudulent conveyance provisions beginning over four hundred years ago with the Statute of 13 Elizabeth. *See* S. Rep. No. 989, 95th Cong., 2d Sess. at 89, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5875 (citing 13 Eliz. c. 5

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[17] A reading of Section 548 which defines "reasonably equivalent value" by reference to state law does not, of course, conflict with Congress' constitutional power to establish uniform bankruptcy laws. U.S. Const., Art. 1, § 8, cl. 4 (providing that Congress has the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States"). *See, e.g., Butner*, 440 U.S. at 54 n.9 ("Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different States.") (quoting *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918); *Vanston Bondholders*, 329 U.S. at 172-73 (Frankfurter, J., concurring) ("To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions . . . . These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after."); *Hanover National Bank v. Moyses*, 186 U.S. 181, 190 (1902) (federal bankruptcy law, in recognizing local exemptions, did not violate uniformity requirement).

(1570)); Zinman, Houle & Weiss, 39 Bus. Lawyer at 977. The purpose of these earlier codifications was the same as that of Section 548—the desire to prevent a debtor from making fraudulent transfers to the detriment of his creditors. *See* S. Rep. No. 989 at 89, 1978 U.S.C.C.A.N. at 5875. Because of the difficulty of proving an intent to defraud, however, certain "badges of fraud" were identified which could make a transfer avoidable, such as a transfer to family members or a transfer for grossly insufficient value; such transfers were deemed to be constructively fraudulent. *See* William H. Henning, *An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 N.C.L. Rev. 257, 260 (1985); Zinman, Houle & Weiss, 39 Bus. Lawyer at 989.

The doctrine of *constructive* fraud, therefore, is a means of identifying and undoing instances of *actual* fraud, where intent is difficult or impossible to prove. Hence, "the purpose of the badges, presumptions, and finally the constructive fraud provisions was to develop methods of ferreting out those transactions that are inequitable to creditors by the debtor's deliberate design or indifference." Zinman, *Nonfraudulent Transfers*, 9 Cardozo L. Rev. at 584. Where a transfer takes place without any legal oversight, an independent evaluation of price adequacy is necessary under Section 548 to determine whether "reasonably equivalent value" was received; a too-low price in such circumstances signals that something fraudulent may have occurred. There is no need for a second, duplicative legal review, however, when a transfer takes the form of a noncollusive foreclosure sale conducted in full accord with state laws which are specifically designed to protect against fraud.[18]

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[18] While state foreclosure laws differ, a number of very significant procedural protections are commonly provided. Procedures governing advertising, bidding, and post-sale ratification and audit are all designed to protect the process from fraud and facilitate the attainment of a reasonable price. *See generally*, David H. Fishman, *The Foreclosure Sale, in Real Estate Foreclosures* 47 (American College of Real Estate Lawyers, ed., 1992). For example, "[i]t is a universal principle of foreclosure law that the foreclosing trustee and mortgagee and the successful bidder may not acquire the property through a foreclosure sale in which anything has been done to 'chill' the bidding." *Id.* at 54. A sale can be set aside (or not confirmed) if state procedural laws were violated or if elements such as fraud, mistake, or unfairness were involved. *See id.* at 54-56; 1 Baxter Dunaway, *The Law of Distressed Real Estate* §§ 14.02[1] & [2][b].

Foreclosure sales are thus unique among the broad spectrum of transfers brought within Section 548's wide sweep in that they carry with them—pursuant to state law—the very protections against fraud which Section 548 is designed to provide. Where state foreclosure law protections are strictly applied, they are fully adequate to arrive at a measure of "reasonably equivalent value" which fulfills the purposes underlying Section 548. Given the foregoing, it is not surprising that despite the long history of fraudulent conveyance statutes, no court prior to *Durrett* had ever suggested that a foreclosure sale conducted in accordance with the applicable law could be avoided as fraudulent. *See Bundles*, 856 F.2d at 820 (citing *Madrid*, 21 B.R. at 426); *Abramson v. Lakewood Bank and Trust Co.*, 647 F.2d 547, 550 (5th Cir. 1981) (Clark, J., dissenting), *cert. denied*, 454 U.S. 1164 (1982); Zinman, Houle & Weiss, 39 Bus. Law. at 977, 986-87.

Efforts to attribute a broader purpose to Section 548, such as the preservation of the bankrupt's estate for distribution to unsecured creditors,[19] are misplaced in light of the historically limited function of fraudulent transfer statutes, *see* Zinman, Houle & Weiss, 39 Bus. Law. at

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[19] *See* Pet. Br. 34 ("the purpose of 11 U.S.C. Section 548 is to recover property for the estate of the bankrupt"); Br. *Am. Cur.* of Frank Allen at 22-23 ("purpose of § 548 is to recover for the estate assets that could be distributed to unsecured creditors").

986-95, and the fact that other provisions of the Bankruptcy Code are designed, within carefully crafted limits, to advance such other purposes.[20] Similarly without merit is the allegation that the court of appeals' construction of Section 548 conflicts with a broad congressional interest, embodied in the Bankruptcy Code as a whole, of preserving the debtor's estate for equitable distribution to creditors. While the preservation of the debtor's estate may be among the themes that runs through the statutory scheme, Congress has never evidenced a single-minded intent to expand without limit the bankrupt's estate, regardless of the cost of doing so or the competing interests involved. *Cf. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190, 220, 222 (1983) (rejecting argument that California's moritorium on nuclear power plants "frustrates the Atomic Energy Act's purpose to develop the commercial use of nuclear power"; while promotion of nuclear power was a central purpose of the Act, there was no congressional intent to pursue it "at all costs"); Tribe, *American Constitutional Law* at 488-89.

Instead, each provision in federal bankruptcy legislation represents the balancing of competing interests necessary to serve the narrowly-drawn purposes expessed therein. *Cf. Lewis v. Manufacturers Nat'l Bank of Detroit,* 364 U.S. 603, 609 (1961) (discussing "balance" that was struck by Congress in § 70 of the Bankruptcy Act "between secured and unsecured creditors"); *id.* at 608 n.6 (limits on avoidance power of trustee necessary to protect interests of creditors) (quoting H.R. Rep. No. 745, 86th Cong., 1st Sess. at 8-9 (1959)). Section 548 em-

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[20] *See, e.g.,* 11 U.S.C. § 547 (making certain preferences avoidable); H.R. Rep. No. 595, 95th Cong., 2d Sess. 178, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138-39 ("preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor"); *see also* Zinman, *Nonfraudulent Transfers,* 9 Cardozo L. Rev. at 585 n.22.

bodies a balance between the need to protect the bankrupt's estate from fraud and the competing need to leave untouched nonfraudulent transfers entered into prior to bankruptcy; it does not stand for the proposition that *any* pre-bankruptcy transfer which arguably reduces the size of the bankrupt's estate should be summarily undone.

2. *The Court Of Appeals' Construction Is Mandated By The Requirement That The Bankruptcy Code Be Read In Light Of Notions Of Federalism And The Preexisting Body Of State Law.*

Not only was the court of appeals' interpretation of Section 548 correct given the language and purpose of the statutory provision, it was affirmatively required by the principles of construction this Court has applied to the Bankruptcy Code. The Court has emphasized that, like other federal statutes which touch upon matters traditionally governed by the States, the Bankruptcy Code must be read in light of notions of federalism. *See, e.g., Kelly v. Robinson,* 479 U.S. 36, 49 (1986).

This reluctance to read the Bankruptcy Code in a manner which is unnecessarily intrusive of traditional areas of state authority reflects the fact that federal bankruptcy law builds upon a preexisting body of state law. *See Vanston Bondholders,* 329 U.S. at 171 (Frankfurter, J., concurring) ("[b]ankruptcy legislation is superimposed upon rights and obligations created by the laws of the States"). While Congress may, through its Bankruptcy power, affect state-created property rights and relationships, the preexisting state property law system remains intact until Congress affirmatively chooses to do so.

The Court has long held that the overlay of federal bankruptcy law does not alter the underlying state law, except insofar as state law actually conflicts with or frustrates the purpose of the federal bankruptcy statute. *See, e.g., Butner,* 440 U.S. at 54 n.9 (state laws are "suspended only to the extent of actual conflict with the

system provided by the Bankruptcy Act of Congress") (citations omitted); *Stellwagen v. Clum*, 245 U.S. 605, 615 (1918) ("It is only state laws which conflict with the bankruptcy laws of Congress that are suspended; those which are in aid of the Bankruptcy Act can stand.") (citing *Miller v. New Orleans Acid & Fertilizer Co.*, 211 U.S. 496 (1909)).[21]

For example, in *Butner v. United States*, 440 U.S. 48 (1979), the Court held that since Congress had not formulated a rule "defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate," *id.* at 54, such interest must be determined by reference to state law. Noting that "[p]roperty interests are created and defined by state law," the Court held that "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 55.[22] *See also Vanston Bondholders*, 329 U.S. at 161 ("What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is

[21] *See also Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 196 (1819) ("It is not the right to establish these uniform [bankruptcy] laws, but their actual establishment, which is inconsistent with the partial acts of the States."). Of course, a state law which actually conflicts with the purposes of federal bankruptcy legislation cannot stand. For example, in *Perez v. Campbell*, 402 U.S. 638 (1971), the Court found that the Arizona Motor Vehicle Safety Responsibility Act, which provided that a discharge in bankruptcy would have no effect on certain accident-related obligations, conflicted with the statutory purpose of giving debtors a "new start" and hence was invalid.

[22] The *Bundles* court's contention that *Butner* is inapplicable in this context because it dealt with an instance of complete federal silence on an issue, *see Bundles*, 856 F.2d at 822, is unconvincing. While Section 548 is a federal rule concerning the circumstances in which a transfer may be avoided, Congress was nevertheless silent on the one matter at issue here—the means by which "reasonably equivalent value" is to be assessed.

a question which, in the absence of overruling federal law, is to be determined by reference to state law.") (footnote and citations omitted).

In sum, the court of appeals appropriately resolved the ambiguity in the phrase "reasonably equivalent value" in a manner consonant both with the principles of federalism repeatedly enunciated by this Court and with the congressional purpose underlying Section 548. The only alternative to resolving Section 548's ambiguity in a manner harmonious with existing state foreclosure laws is for the federal bankruptcy courts to create a new federal rule out of whole cloth. Such an imposition of a judicially-created rule ignores the assumption that when Congress intends to "radically readjust[] the balance of state and national authority" it will be "reasonably explicit" in making that adjustment, rather than "entrust[ing] its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. at 540; *see also Kelly*, 479 U.S. at 49 n.11.

Because Congress provided no suggestion—much less an explicit one—that a court should interpret "reasonably equivalent value" in a manner disruptive of state law, the proposed federal formulations offered by other courts of appeals represent unwarranted judicial intrusions into areas historically committed to state authority. Whether that intrusion takes the form of the strict mathematical measure for "reasonable equivalence" (as in *Durrett* and its progeny) or a fact-intensive, case-by-case federal review of price adequacy (as in *Bundles*), the result is the same: longstanding state law is displaced by a federal judge without any sign that Congress intended such an outcome.

C. Imposing A Federal Standard Of Price Adequacy On Lawful Foreclosure Sales Disrupts The Balance States Have Struck Between The Interests Of Mortgagors And Mortgagees And Is An Improper Way To Change State Foreclosure Law.

State foreclosure laws represent a balancing of the interests of mortgagors and mortgagees based on local conditions and provide numerous protections to ensure the fairness of the process.[23] "The history of mortgage law has seen a long series of tradeoffs as equity courts and legislatures developed procedures to balance the rights of the lender and borrower." Zinman, *Nonfraudulent Transfers*, 9 Cardozo L. Rev. at 603. There may be disagreement as to exactly where the balance between mortgagors and mortgagees should be struck in a particular jurisdiction.[24] Under our federal system, however, credence "should be given to each state's determination of what that balance should be, given the circumstances that exist in that jurisdiction." *Id.*

Superimposing a nationwide federal standard of price adequacy onto the analysis of foreciosure sales under Section 548 completely upsets the balance arrived at by each State's laws. *See e.g.*, A.B.A. Section of Real Property, Probate and Trust Law, *Report No. 2 of the Section*

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[23] State laws contain judicial and legislative limits on foreclosures "designed particularly to insure that the foreclosed property is not sold for an inadequate price at the foreclosure sale." 1 Baxter Dunaway, *The Law of Distressed Real Estate* § 14.01 at 14-2; *see generally id.*, Chapter 14; Fishman, *The Foreclosure Sale, in Real Estate Foreclosures* at 47-56.

[24] *See generally* Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. Cal. L. Rev. 843 (1980) (critiquing mortgage sale process). Nevertheless, Washburn recognizes the economic and fairness difficulties associated with "overly burden[ing] the lender," *id.* at 938, and acknowledges that "[b]alancing the equities [between mortgagors and mortgagees] is difficult, since the parties should be neither unfairly advantaged nor unfairly punished." *Id.* at 939.

of Real Property, Probate and Trust Law in *Annual Report of the A.B.A.*, Vol. 108 at 1089, 1091 (1983) ("ABA Section Report") (*Durrett* approach "will play havoc with state foreclosure and default statutes which are designed to effect a fair balance between the rights of the creditor and the rights of the debtor"). The negative economic effects associated with the increased uncertainty such a disruption entails have been duly noted by courts and commentators alike.[25] While there may not be unanimous consensus as to the precise economic consequences of the additional uncertainty which such a federal rule injects into the foreclosure process,[26] the potential for profound unintended economic consequences counsels deference to the legal and political choices made by individual States, in the absence of a clear congressional directive to upset those choices.

Those urging an interpretation of Section 548 which would make lawfully conducted foreclosure sales avoid-

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[25] *See, e.g., Abramson*, 647 F.2d at 550 (Clark, J., dissenting) (the "cloud upon mortgages" cast by majority's approach "tends to depress further the prices of foreclosure sales"); *In re Alsop*, 14 B.R. 982, 987 (Bankr. D. Alaska 1981) ("The specter of th[e] uncertainty [presented by *Durrett* rule] will severely inhibit participation at the foreclosure sale by anyone other than the original creditor, thus depressing bid prices to the general detriment of debtors."), *aff'd* 22 B.R. 1017 (D. Alaska 1982); Ehrlich, 71 Va. L. Rev. at 963-64 (1985) ("potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty"); Lawrence D. Coppel & Lewis A. Kann, *Defanging Durrett: The Established Law of "Transfer"*, 100 Banking L.J. 676, 682 (1983) ("impact of *Durrett* is . . . . to undermine the very foundation of the entire secured lending sector of the national economy, that is, the lender's ability to realize on its security"); ABA Section Report at 1090 ("[c]reditors will hesitate to make any mortgage loans under conditions where they may not be able to realize upon their security in the event of default").

[26] *Compare* Philip Schuchman, *Data on the Durrett Controversy*, 9 Cardozo L. Rev. 605 (1987) *with* Robert M. Zinman, *Durrett Data: Shucking the Husks from the Grain*, 9 Cardozo L. Rev. 1013 (1988).

able appear to be largely motivated by the perception that some state foreclosure laws are insufficiently protective of certain interests.[27] Such concerns are based on a political judgment that a particular State has struck the wrong balance between mortgagors and mortgagees. But in the absence of a clear statement by Congress, a federal standard of price adequacy applicable to foreclosure sales followed by bankruptcy represents a constitutionally infirm and ultimately counterproductive means of seeking to achieve desired changes in state foreclosure law. As one commentator has noted,

> It is not, in any case, the function of the federal Bankruptcy Code to attack collaterally what one does not like in state law. Using the Bankruptcy Code for something it was not intended to do can only result in adverse consequences to the well-ordered administration of bankruptcy and the smooth functioning of the economy of the nation.

Zinman, *Nonfraudulent Transfers*, 9 Cardozo Law Review at 603. *See also* Henning, 63 N.C.L. Rev. at 285 (as a means of correcting deficiencies in state foreclosure law, *Durrett* is a "blunt instrument forged from statutes that were not drafted with such a doctrine in mind.").

Reading a federal standard of price adequacy into Section 548 would create a problematic dual system in which bankruptcy triggers new rules regarding the analysis of completed foreclosure sales. Such an outcome is wholly contrary to this Court's stated interest in "discourag[ing] forum shopping" and "prevent[ing] a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Butner*, 440 U.S. at 55 (quoting *Lewis*, 364 U.S. at 609).

Moreover, because the added federal level of protection in the foreclosure realm would extend only to those cases in which foreclosure is followed by bankruptcy, it

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[27] *See* Br. *Am. Cur.* of Frank Allen at 43-46; Ehrlich, 71 Va. L. Rev. at 962, 975.

would leave state law determinative as to those foreclosure sales *not* followed by bankruptcy. Faced with a dual system in which their own laws are rendered irrelevant when foreclosure is followed by bankruptcy, States would be seriously impeded in their efforts to weigh competing interests and strike an appropriate balance for the remaining universe of cases. The further development of state law would be improperly hindered by such a rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 23, 1993